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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-454

MOORMAN MANUFACTURING COMPANY,
Appellant,

vs.

G. D. BAIR, DIRECTOR OF REVENUE,
STATE OF IOWA,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF IOWA

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE SUPREME COURT
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JURISDICTIONAL STATEMENT

Moorman Manufacturing Company appeals from the final judgment of the Supreme Court of Iowa, Civil Appeal No. 2-60220, entered May 25, 1977, after order, entered June 27, 1977, denying Appellant's Petition for Rehearing. The judgment affirms assessment of additional Iowa income tax against Moorman. This Jurisdictional Statement is submitted to show that the Supreme Court of the United States has jurisdiction of the Appeal and that the questions presented are constitutionally substantial and of public importance.

The Appellees are G. D. Bair in his official capacity as Director of Revenue, State of Iowa and through him the State of Iowa.

OPINIONS BELOW

The opinion and order of the Iowa Director of Revenue dated December 17, 1974, is unreported. A copy is hereto attached as Appendix A. The Findings of Fact and Conclusions of Law of the District Court of the State of Iowa in and for Polk County, Equity No. CE 3-1595, filed December 17, 1976, the revision thereof filed January 7, 1977 (entitled Ruling on Joint Motion to Reconsider and Supplemental Findings), and that Court's Judgment and Decree are unreported. Copies are hereto attached as Appendix B. The opinion and judgment of the Supreme Court of Iowa entered May 25, 1977, is reported at 254 N.W. 2d 737 (1977). Copies of that opinion and the order denying rehearing entered June 27, 1977 are hereto attached as Appendix C. A copy of the Notice of Appeal filed in the Supreme Court of Iowa on August 4, 1977 is hereto attached as Appendix D.

JURISDICTION

Moorman challenged, in the District Court of the State of Iowa, an assessment of additional Iowa corporate income tax, §422.33(1)(b), Code of Iowa, "apportioning" Moorman's entire unitary income by the ratio of sales to Iowa customers to all sales, although all goods sold to Iowa customers were manufactured in Illinois.

For its fiscal years 1968 through 1972, Moorman apportioned its income for Iowa, Illinois (and other states) income tax purposes in accordance with the Uniform Division of Income for Tax Purposes Act, which provides a three-factor formula, equally weighted, of property, payroll and sales. Iowa has not adopted the Uniform Act.

The assessment was for the difference between the amount reported pursuant to the three-factor formula and the amount determined by the Director of Revenue on the sales-only formula.

Moorman appealed to the District Court which accepted Moorman's contentions that the statutory formula was unconstitutional on its face, on due process and commerce clause grounds, because of failure to recognize the contributions of capital and labor to the production of income and because of the double taxation resulting from the interplay of the Iowa and Illinois statutes, the latter employing the conventional three-factor formula. Moorman contended also that the application of the statute in this case made the statute void on those grounds and as a denial of equal protection. The District Court ruled against the equal protection claim and did not discuss application. The Director appealed, Moorman cross-appealed and the Supreme Court of Iowa ruled adversely to Moorman on all issues. Its judgment became final when it denied Moorman's petition for rehearing on June 27, 1977.

The jurisdiction of this Court to hear this appeal is conferred by Stat. 929, 28 USC 1257 (2), the issue being a state statute unconstitutional on its face and so applied as to burden unduly Moorman's interstate commerce, to deprive it of its property without due process of law and to deny it equal protection of the laws, contrary to Art. I, Sec. 8, Cl. 3 of the Constitution of the United States relating to interstate commerce and to the due process and equal protection guaranties of the Fourteenth Amendment thereto. The following cases sustain such jurisdiction: *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282, 288-289 (1921); *Bantam Books Inc.* v. *Sullivan*, 372 U.S. 58 (1963); *Wheeling Steel Corp.* v. *Glander*, 337 U.S.

562 (1949); *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975): "Moreover, where a final decision of a state court has sustained the validity of a state statute challenged on federal constitutional grounds, an appeal to this Court lies as a matter of right." (420 U.S. at 606).

QUESTIONS PRESENTED

Interstate Commerce, Due Process, Territorial Jurisdiction and Equal Protection

Whether the single-factor destination sales formula for the "apportionment" of net income, prescribed by the Iowa income tax statute, is invalid:

(a) as repugnant to the Commerce Clause of the Constitution;

(b) as repugnant to the Due Process Clause of the Fourteenth Amendment to the Constitution;

(c) as unconstitutionally extending the power of the State beyond its territorial jurisdiction;

(d) as repugnant to the Equal Protection Clause of the Fourteenth Amendment to the Constitution;

when the application of such formula results in the taxation by Iowa of 100% of the net income of a foreign corporation derived from that segment of its business consisting of the manufacture of products without Iowa and their sale to customers within Iowa, while a domestic corporation pays no Iowa income tax with respect to its exports, thus

(1) discriminating against interstate commerce by imposing upon it cumulative tax burdens (double taxation) to which local commerce is not subject;

(2) subjecting to Iowa tax an amount of income out of all reasonable proportion to the business actually done within Iowa;

(3) taxing extraterritorial values and assigning to Iowa values which belong to, and have been properly taxed by, another state (Illinois); and

(4) subsidizing exports and imposing a tariff on imports.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Art. I, Sec. 8, Cl. 3 of the Constitution of the United States and the Due Process and Equal Protection Clauses of the Fourteenth Amendment thereto are set forth in Appendix E-1, p. A99, *infra*.

The pertinent sections of the Code of Iowa, being Sections 422.33 and 422.35 contained in Volume II pages 1669 and 1670, Code of Iowa (1966) are set forth verbatim in Appendix E-2, pp. A100-A103, *infra*.

STATEMENT OF THE CASE

The operative facts were fully stipulated (R. Item 2, pp. 9-47), the sole issue on appeal being the constitutionality of the Iowa statute applied to those facts.

Moorman Manufacturing Company is an Illinois corporation headquartered in Quincy, Illinois. Its business is the manufacture of animal feeds which it sells to farmers and others in thirty states, including Iowa. During the years at issue, all goods sold to Iowa customers were manufactured in Illinois and no manufacturing was done in Iowa. Orders are solicited from Iowa customers by

a substantial force of resident salesmen and typically are filled from stocks in warehouses in Iowa to which they have been shipped from factories in Illinois.[1]

Appellant brought proceedings before the Iowa Director of Revenue for review of income tax deficiencies for the taxable years 1968 through 1972 assessed by him pursuant to the income tax section (Sec. 422.33) of the Code of Iowa. The Director affirmed the assessments. Moorman then appealed to the District Court, where there was trial *de novo*. The District Court found the statutory "apportionment" formula "facially unconstitutional" and struck most of the assessments (all that are involved in this Appeal). The Supreme Court of Iowa reversed the trial court and reinstated the assessments.

The assessments under Appeal are the differences between what Moorman paid, following the three-factor formula of the Uniform Division of Income for Tax Purposes Act, and the amounts asserted by the Director following the Iowa statutory single-factor formula of sales attributed to destination. The assessments tax 100% of Moorman's income from that segment of its business which consists of manufacturing goods in Illinois and selling them to customers in Iowa, taking no account of the contribution of capital and labor to the production of income.

The District Court found as *facts*: The Iowa single-factor formula taxed 100% of the income from each dollar of sales of Moorman's goods into Iowa, although 75% of payroll and 30% of capital are used in the manufacture of the goods (in Illinois) (App. B. p. A28, *infra*); the Iowa formula fails to reasonably apportion profits traceable

1. Moorman also made sales in Illinois which were delivered to Iowa. These were treated as Iowa sales under the statute in effect during the last year at issue and included in the controverted assessment. App. A, p. A2, *infra*.

to Illinois and taxes activities occurring in Illinois (App. B, p. A29, *infra*); the Iowa formula produces multiple taxation of the same income (App. B, p. A37, *infra*); Illinois taxed the relevant income by the three-factor formula (App. B, p. A33, *infra*); the Iowa formula taxed values beyond those which may be justly allocated to intrastate activity, and resulted in "gross overreaching" by the State (App. B, p. A33, *infra*); for 1968, the Iowa and Illinois formulae taken together taxed 141.76% of Moorman's income from its Iowa sales (App. B, p. A36, *infra*); Iowa is the only state attributing income to sales alone (App. B, p. A37, *infra*); the interplay of the Iowa and Illinois formulae would give unfair advantage to an Iowa manufacturer selling in Illinois in that only one-third of the relevant income would be taxed (App. B, p. A38, *infra*).

The District Court held, on the basis of those findings, that Iowa's single-factor formula violated the Commerce and Due Process provisions of the United States Constitution, and cancelled the assessments (App. B, pp. A40, A41, *infra*). Upon appeal, the Supreme Court of Iowa reversed.

The Supreme Court's opinion makes much of the point that an apportionment formula cannot be precise and hence approximation is all that is required (App. C, p. A78, *infra*). It asserts that a number of decisions of this Court approve single-factor formulae, without noting that none of them was anything like *this* single-factor formula (App. C, p. A72, *infra*). It quotes extensively from *General Motors Corporation* v. *District of Columbia*, 380 U.S. 553 (1965) but dismisses it as a statutory, rather than a constitutional, decision (App. C, p. A76, *infra*), incidentally pointing out that the Iowa statute contains no provision that income from interstate commerce shall be "deemed to" arise in both states (as the D.C. statute does), and says there is no due process requirement for such "deeming"

(App. C, p. A78, *infra*). It asserts that evidence does not establish either double taxation or taxation of extra-territorial values—ignoring the findings of fact (App. C, p. A80, *infra*). It denies that the assessments tax 100% of Moorman's income from Iowa sales because of statutory adjustments to the income *base*—thus relying upon an aspect of the tax law wholly irrelevant to apportionment, to conclude that Moorman had not shown that its income from Iowa sales had been taxed more than 100%, again ignoring the findings of fact (App. C, p. A82, *infra*).

The assessments were on a basis identical to that declared invalid in *General Motors Corporation* v. *District of Columbia, supra.* It was stipulated by the parties that if that basis is unconstitutional, the appropriate basis is the Uniform Act by which Moorman paid initially (R. Item 2, p. 19).

HOW THE FEDERAL QUESTIONS WERE RAISED IN THE PROCEEDINGS BELOW

The constitutional questions were presented and vigorously argued, both orally and in writing, at every opportunity and were considered by each of the three tribunals: the administrative proceeding, the District Court in the trial *de novo*, and the Iowa Supreme Court, as shown by their respective opinions (App. A, B, C, pp. A1-A96, *infra*). The questions raised, in each case contending invalidity under the pertinent provisions of the United States Constitution, of the statute both on its face and as applied, were: denial of equal protection; denial of due process; and burden on interstate commerce. In this appeal, while noting the equal protection point, reliance is principally upon the due process and commerce clauses.

The order of the Director of Revenue dated December 17, 1974, following statutory hearing, notes (App. A, p. A4, *infra*):

> The taxpayer contends that a single sales factor formula inherently violates the commerce and due process clauses of the United States Constitution. . .

The stipulation of February 20, 1976 (R. Item 2, p. 16) on which the case was tried *de novo* in the District Court, said:

> 33. The questions of law presented for determination in this case are as follows:
>
> • • •
>
> II. Constitutionality of the Single Sales Factor Formula.
>
> A. Whether section 422.33(1)(b), Code of Iowa, which requires that net income from the manufacture or sale of tangible personal property be apportioned to the State of Iowa for income tax purposes pursuant to the single sales factor formula is in violation of any of the following provisions of the Constitution of the United States:
>
> 1. The due process clause of Section 1 of the Fourteenth Amendment.
>
> 2. Article I, Section 8, Clause 3 (the commerce clause).
>
> 3. The equal protection clause of Section 1 of the Fourteenth Amendment.

The Stipulation followed the above issues as to unconstitutionality of the statute on its face with similar questions as to its unconstitutionality as applied (R. Item 2, p. 17).

In its brief to the Supreme Court of Iowa, Moorman stated:

> The District Court correctly determined that the single sales factor method . . . is facially unconstitutional as in violation of the due process clause of the Constitution of the United States . . . (R. Item 3, p. 7).
>
> The District Court correctly determined that the single sales factor method . . . is facially unconstitutional as in violation of the commerce clause of the Constitution of the United States . . . (R. Item 3, p. 13).
>
> The District Court erred in holding that the single sales factor method . . . does not violate the equal protection clause of the Constitution of the United States . . . (R. Item 3, p. 22).
>
> Moorman's brief similarly argued unconstitutionality of the statute as applied (R. Item 3, p. 30).

In answer to these contentions, the respective tribunals said: Director of Revenue (App. A, p. A6, *infra*):

> Moreover, because of the differences in the types of apportionment formulae and tax bases among the states, double taxation can and does result. And the use of formulae by other states where the taxpayer does business is not relevant . . . While it is true that Iowa's single factor formula does not give effect to the corporation's geographical distribution of property and payroll, there is no constitutional or statutory requirement that it must . . . The Director of Revenue finds that the Iowa single sales factor formula does not operate to subject taxpayer to taxation on a greater portion of his net income than is reasonably attributable to business or sources within this state.

District Court:

> . . . we conclude . . .
>
> (2) that Iowa Code Section 422.33(1)(b) does not violate the Equal Protection Clauses of either United States Constitution or Iowa Constitution;
>
> (3) that Iowa Code Section 422.33(1)(b) is facially unconstitutional in violation of the Due Process Clauses of both the United States Constitution and Iowa Constitution; and
>
> (4) that Iowa Code Section 422.33(1)(b) is facially unconstitutional in violation of the Commerce Clause, Article I, Section 8, Clause 3, of the United States Constitution because it
>
> (a) does not fairly apportion interstate business activity to intrastate tax values;
>
> (b) causes multiple taxation of corporate net income by more than one jurisdiction; and
>
> (c) provides local business with a direct commercial advantage not so enjoyed by interstate business.

(App. B, p. A40, *infra*)

Supreme Court of Iowa:

> . . . the statutory language on which the decision turned in *General Motors* . . . was the specific requirement that net income derived from a trade or business carried on within or without the District shall "be deemed to be income from sources within and without the District." It was the Court's interpretation of this statutory phrase—which has no analogue in the Iowa statute and can scarcely be found in the due process

clause—which was the fulcrum of the Court decision . . . we conclude that section 422.33(1)(b) calls for a method of allocation which is fairly calculated to assign to Iowa only that portion of the taxpayer's net income reasonably attributable to the trade or business done in Iowa (App. C, p. A78, *infra*) . . . [Because of deductions from gross income in arriving at taxable income]: Clearly, a corporation in Moorman's situation is not taxed by Iowa on 100% of its income from Iowa sales (App. C, p. A82, *infra*).

* * *

We rely again on the principles recognized by the Supreme Court . . . in concluding use of the single-sales-factor formula provided by the statute does not violate the commerce clause of the United States Constitution (App. C, p. A82, *infra*).

* * *

No evidentiary justification is provided for a conclusion Moorman is somehow different from those corporations legitimately subject to the provisions of section 422.33(1)(b). In the absence of such evidence Moorman has not made out a sufficient case for overturning on constitutional grounds the application of the Iowa single-sales-factor formula to its net income (App. C, p. A87, *infra*).

THE QUESTIONS ARE SUBSTANTIAL AS A MATTER OF CONSTITUTIONAL LAW

This case is a true descendant of *General Motors Corporation* v. *District of Columbia*, 380 U.S. 553 (1965). The Supreme Court of Iowa has refused to heed the unmistakable logic of this Court and followed the path, which this

Court reversed, of the Court of Appeals for the District of Columbia Circuit. This case is not controlled by the *decision* in *General Motors*, which is statutory, but it *is* controlled by the *reasoning* therein, which is constitutional.

The facts, the local laws and the results are essentially the same. The difference is that in *General Motors* this Court could and did correct the interpretation of a Congressional statute, and hence did not ground its decision on constitutional considerations, whereas here the Iowa Supreme Court's interpretation of the Iowa statute is conclusive, and this Court is asked to apply the constitutional principles which *General Motors* expounded, but found unnecessary to apply, in that case.

The Iowa Court said that not all of Moorman's income derived from Iowa sales was taxed because deductions were allowed in computing taxable net income,[2] thus importing into an apportionment argument a wholly irrelevant discussion of base. The Supreme Court of Iowa apparently recognizes that multiple taxation of the income of interstate commerce, solely because it is interstate, unconstitutionally imposes upon interstate commerce cumulative burdens not borne by intrastate commerce.[3] Its sole justification for finding that the Iowa apportionment formula does not cause multiple taxation is that the Iowa Code, Section 422.35, allows certain deductions in arriving at net income subject to apportionment, such as a deduction of 50% of the taxpayer's federal income tax liability.[4] This approach ignores the fact, which should be obvious, that the definition of taxable income has no bearing on its apportionment. The definition of taxable income applies equally to both

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2. App. C, p. A82, *infra*.
3. App. C, p. A81, *infra*.
4. App. C, p. A82, *infra*.

domestic and foreign corporations and is controlling for this purpose. The Court is not at liberty to say "income" is something different from what the statute says.

This Court has recognized and reiterated that income is the product of capital or labor or both combined. *Stratton's Independence, Ltd.* v. *Howbert*, 231 U.S. 399 (1913); *Eisner* v. *Macomber*, 252 U.S. 189 (1920); and that income is earned by a series of transactions beginning with manufacture and ending with sales, *Underwood Typewriter Co.* v. *Chamberlain*, 254 U.S. 113, 120 (1920). Relying on those principles, it has approved formulae dividing income on the basis of location or utilization of property (*Underwood, supra; Bass, Ratcliff & Gretton* v. *State Tax Commission*, 266 U.S. 271 (1924)), and on the basis of the familiar three factors (*Butler Bros.* v. *McColgan*, 315 U.S. 501 (1942); *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450 (1959)). *General Motors* can itself be cited for each of those three propositions. The Court has never approved a single factor *sales* formula for the division of income.

As this Court said in *General Motors*:

> "The use of an apportionment formula based wholly on the sales factor, in the context of general use of the three-factor approach, will ordinarily result in multiple taxation of corporate net income; for the States in which the property and payroll of the corporation are located will allocate to themselves 67% of the corporation's income, whereas the jurisdictions in which the sales are made will allocate 100% of the income to themselves." (380 U.S. at 559).

The District Court found as a *fact* that substantial double taxation had actually occurred in this case; quoting the above from this Court it said: "Moorman finds its income taxed by both Iowa and Illinois exactly as the *General Motors* court described."[5]

In this case the total overlap is (as to 1968) 141.76%.[6] The principal reason it is not 167% is that Moorman has some property and payroll in Iowa, so that the income related thereto is not attributable to Illinois under that state's formula.

The Supreme Court of Iowa made no direct response to the findings of the district court, but repeated the oft-quoted language from *Wisconsin* v. *J.C. Penney*, 311 U.S. 435, 61 S. Ct. 246, 85 L. Ed. 267, 130 A.L.R. 1229 (1940):

> "The Constitution is not a formulary. It does not demand of states observance of rigid categories nor precision of technical phrasing in their exercise of the most basic power of government, that of taxation. For constitutional purposes the decisive issue turns on the operating incidence of a challenged tax. A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society... The simple, but controlling question is whether the state has given anything for which it can ask return."

The Iowa Court then went on to hold that the Iowa formula

> ". . . is fairly calculated to assign to Iowa only that portion of the taxpayer's net income reasonably at-

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5. App. B, p. A33, *infra*.
6. App. B, p. A36, *infra*.

tributable to the trade or business done in Iowa since the taxing power exerted by the statute bears fiscal relation to the protection, opportunities and benefits given by the state."[7]

There probably is no other passage in Supreme Court reports that is so often misapplied as Justice Frankfurter's felicitous phrases. There was in that case no quarrel with the apportionment formula. The issue was whether the "privilege dividend tax" was an additional income tax, and hence constitutional, or a tax on the "privilege" of paying dividends, which could not constitutionally be applied to Penney since all matters connected with dividends occurred in New York. The Wisconsin Supreme Court had said the tax was not an income tax. Justice Frankfurter and four other justices held that it was an income tax, and the quoted language tells why "practical operation" prevails over "technical phrasing." Four justices dissented on the ground it was not an income tax in practical operation. In that same opinion, Justice Frankfurter warned against relying on "Ambiguous intimations of general phrases in opinions torn from the significance of concrete circumstances. . ." The principal quotation was apt in the "concrete circumstances" of *Penney* but is meaningless in *Moorman*.

"The question" remains "simple", but it definitely is not "controlling" here. In the context of this case, in which the only issue is how much tax, not "whether", the Iowa court's language quoted above is an obvious non sequitur. It says the "apportionment" is fair merely because Moorman is taxable.

The district court recognized the distinction, quoting from *Norfolk & Western Railway Co.* v. *Missouri State*

7. App. C, p. A78, *infra*.

Tax Commission, 390 U.S. 317, 88 S. Ct. 995, 19 L. Ed. 2d 1201 (1968).

The Commerce Clause prohibits the imposition upon interstate commerce of such cumulative burdens to which intrastate business is not subject. *H. P. Hood & Sons, Inc.* v. *DuMond*, 336 U.S. 525, 538-539 (1949); *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250, 255-256 (1938); *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157, 170 (1954); *J.D. Adams Mfg. Co.* v. *Storen*, 304 U.S. 307, 311-312 (1938); *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 458, 462-463 (1959).

As was recognized in *General Motors*, the sales factor does not *apportion* income; it merely identifies the income of the pertinent segment of the business. The purpose and effect of a destination sales factor is to subsidize exports and penalize imports. It is well to keep in mind that the constitutional inferences in *General Motors* were based upon, in addition to strong precedent, inescapable logic and fundamental principle concerning the sources of income, its geographical attribution and its measurement. Every bit of that base is equally present here and compels the same result.

In sustaining the tax in the face of the record and the findings, the Supreme Court of Iowa has placed itself in direct conflict with this Court's declaration that the *Underwood* and *Bass* decisions ". . . are not authority for the conclusion that, where a corporation manufactures in one State and sells in another, the net profits of the entire transaction, as a unitary enterprise, may be attributed, regardless of evidence, to either State." *Hans Rees' Sons, Inc.* v. *North Carolina*, 283 U.S. 123, 132 (1931). This principle was reaffirmed in the *General Motors* decision: ". . . required is that the formula adopted for general ap-

plication take account of the geographical spread of the major dimensions of a business." 380 U.S. 553, 558, fn. 8.

The assessment, however, attempts to reach values not within the territorial jurisdiction of Iowa. The district court found as a fact that the income which Iowa taxed in its entirety was ". . . to a greatest degree attributable to Illinois plant and personnel inputs,"[8] and further found as a fact that the amount of income so assessed was out of all reasonable proportion to the business done in Iowa.[9] The Due Process Clause of the Fourteenth Amendment restrains States from taxing values not within their jurisdiction, *Wallace* v. *Hines*, 253 U.S. 66, 70 (1920), and prohibits the use of any apportionment or allocation which, either intrinsically or as applied in particular circumstances, taxes ". . . a percentage of income out of all appropriate proportion to the business transacted . . . in that State." *Hans Rees' Sons, Inc.* v. *North Carolina*, 283 U.S. 123, 135 (1931).

Furthermore, even apart from the specific constitutional protection of "due process", a state may not reach transactions outside its territorial jurisdiction. *New York, Lake Erie & Western R.R. Co.* v. *Pennsylvania*, 153 U.S. 628, 646 (1894); *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340, 342 (1954).

There is a strong pressure on local governments to defy the federal principle of a national common market. This is well illustrated by the shortsighted action of the Iowa Manufacturers Association in filing in the Iowa courts briefs *amicus* supporting the single-factor sales formula. It completely exempts them from Iowa tax on their ex-

8. App. B, p. A28, *infra*.

9. App. B, p. A33, *infra*.

ports, and heavily handicaps their out-of-state competitors in local markets. It is for such reasons that the Constitution makes the federal government, and this Court in particular, the arbiter of such matters.

In his order, the Director of Revenue noted: "Iowa is the only state requiring apportionment of income on the basis of a single factor formula. Most states allow corporations to file state income or franchise tax returns on the basis of some form of three factor formula, consisting of property, payroll and sales . . . Moreover, because of the difference in the types of apportionment formulae and tax bases among the states, double taxation can and does exist. And the use of formulae by other states where the taxpayer does business is not relevant.[10] Such a conclusion cannot be squared with this Court's opinion in *General Motors*.

While disagreeing with the District Court's analysis of and conclusion in the "equal protection" portion of the argument (he spoke of "corporations" as a class contrasted with other types of taxpayers, rather than "foreign corporations" as a class, contrasted with domestic corporations) we think Judge Critelli's opinion says about all there is to say on due process and interstate commerce. Insofar as it relates to those two issues, we adopt it.[11]

10. App. A, pp. A5, A6, *infra*.

11. App. B, pp. A17-A22, A25-A39, A40-A41, *infra*.

THE QUESTIONS ARE SUBSTANTIAL AS A MATTER OF PUBLIC IMPORTANCE

In *General Motors* v. *District of Columbia,* 380 U.S. 553, this Court noted that, while it seldom interfered with Court of Appeals interpretations of District statutes, it would do so when, as in that instance, there is ". . . an impact not confined to the Potomac's shores, but reaching far beyond" 380 U.S. at 556.

In Iowa more than fifty cases are awaiting the outcome of this one. And here again, the national impact is of far greater importance. Iowa is currently the only state out of 45 states (and the District of Columbia) imposing a corporate tax based on net income which is attempting to attribute to itself 100% of the income of foreign manufacturers selling to domestic customers; some others so disposed may have been discouraged by *General Motors.* If the Iowa statute is sustained the pressures mentioned above will surely induce others to follow suit, with the further consequences deleterious to the common market envisioned by this Court in *General Motors.*

A more subtle version is now appearing. States have begun to use sales and one other factor equally weighted, or to take all three factors and give sales double weight. There is an alarming trend: Florida, in 1971, adopted a new income tax weighting sales 50% and property and payroll 25% each. Wisconsin switched from equal weighting to a similar approach effective January 1, 1975, New York followed suit effective January 1, 1976 and Massachusetts did so effective January 1, 1977.

If the intent of the authors of the Constitution that this nation be an area of free trade is to be honored, this creeping return to protectionism must be contained. If

the decision of the Iowa Supreme Court is allowed to stand it will accelerate the politically-oriented tendency of state governments to adopt systems of taxation which "protect" home-based industry and raise barriers to out-of-state manufacturers, with the adverse results already recognized by this Court: "may tend to result in the unhealthy fragmentation of enterprise and an uneconomic pattern of plant location . . ." (*General Motors Corporation* v. *District of Columbia,* 380 U.S. at 560).

As the requirements of government, at all levels, grow, the pressures increase to shift the burden more and more to non-residents and non-voters, and the prime target is, of course, foreign corporations. When taxes, not so long ago, took only three percent of gross national product, the problem was less acute and less demanding; now when the take is more than ten times as much the need for strong reaffirmation of federalism is overwhelming.

CONCLUSION

The decision of this Court is needed to halt the effort of Iowa to shift its tax burden to foreigners and remove the temptation for other states to do likewise. The principles were well stated in *General Motors Corporation* v. *District of Columbia,* 380 U.S. 553, but because the Court expressly eschewed applying them in that decision as constitutional limitations on states the opportunity for the present overreaching was left technically open. It is now time to close it.

Following the decision in *Northwestern States Portland Cement Company* v. *Minnesota,* 358 U.S. 450 (1959), there was great clamor for protection of interstate com-

merce. In response, a group of state tax administrators urged their legislatures to organize the Multistate Tax Compact and Commission. The three-factor formula contained in the Uniform Division of Income for Tax Purposes Act (promulgated by the National Conference of Commissioners on Uniform State Laws and approved by the American Bar Association) has been strongly urged by the Commission for universal adoption.

In *General Motors* this Court said, "However, at times application of the District Code has an impact not confined to the Potomac's shores, but reaching far beyond. This is such a case. . . ." 380 U.S. at 556. Iowa has refused to adopt the Uniform Act and if the decision of its Supreme Court is allowed to stand, the *General Motors* decision will be rendered meaningless "beyond the shores of the Potomac."

It is submitted that the decision of the Iowa Supreme Court extends the taxing power of the State outside its territorial jurisdiction and beyond due process, interstate commerce and equal protection limitations imposed by the United States Constitution to the detriment of the national market. The constitutional violation here seems so obvious on the authority of *Stratton's Independence, Ltd.* v. *Howbert, Eisner* v. *Macomber, Underwood Typewriter Company* v. *Chamberlain, Bass, Ratcliff & Gretton Limited* v. *State Tax Commission, Hans Rees' Sons, Inc.* v. *North Carolina,* all *supra, Boston Stock Exchange* v. *State Tax Commission,* 429 U.S. 318 (1977)—and see also *General Motors Corporation* v. *District of Columbia*—that this ap-

peal deserves plenary consideration, with briefs on the merits and oral argument, for its resolution.

Respectfully submitted,

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APPENDIX

APPENDIX A

BEFORE THE STATE DEPARTMENT OF REVENUE
Lucas State Office Building
Des Moines, Iowa

IN THE MATTER OF THE CORPORATION INCOME TAX LIABILITY OF MOORMAN MANUFACTURING COMPANY, 1000 NORTH 30th STREET, QUINCY, ILLINOIS 62310

ORDER

This matter came on for hearing before the Director of Revenue on October 24, 1974. Present on behalf of the taxpayer were Walter R. Brown and John V. Donnelly, Attorneys. Present on behalf of the Director of Revenue were Ronald Amosson, Director, Income Tax Division, John Christensen, Auditor, Corporation Audit Section, and Harry M. Griger, Assistant Attorney General.

STATEMENT OF FACTS

The taxpayer, a corporation, is a manufacturer with its principal place of business at Quincy, Illinois. The taxpayer does no manufacturing in Iowa and its products which are delivered within Iowa are manufactured and sold within the State of Illinois. For the taxpayer's fiscal years ending March 31, 1968, March 31, 1969, March 31, 1970, March 31, 1971, and March 31, 1972, an assessment for additional corporation income tax was issued by the Department of Revenue against the taxpayer. The taxpayer protested this assessment and raised, prior to and at the hearing, four questions. Two of these questions

have been resolved between the Department and the taxpayer and are no longer in controversy. One of these questions related to the treatment of related expenses in §422.33(1)(a) of the Iowa Code. Taxpayer's computation of such expenses per its tax returns was accepted by the Department for the years in question. The second question involved the definition of "gross sales of the corporation within the state" in §422.33(1)(b) of the Code prior to amendment in §§37 and 38, Chapter 165, Acts of 64th General Assembly, First Session (1971). Prior to such amendment, the numerator of the statutory Iowa sales factor apportionment formula required that both the sale and delivery of the goods occur in Iowa. The amendment to this statute requires that only the delivery of the goods occur in Iowa in order that such sales be contained in the numerator of the formula. For the fiscal years ending March 31, 1968 through March 31, 1971, a portion of the taxpayer's sales which were included by the Department in the numerator of the single sales factor formula were made in Illinois with delivery in Iowa. Consequently, the assessment must be adjusted because such sales should have only been contained in the demoninator of the formula.

Therefore, the taxpayer presents two issues which the Director of Revenue must resolve. These are: (1). Whether the Department of Revenue may make additional income tax assessments within the six months limitation period set forth in §422.25(1) of the Iowa Code where such tax assessment is unrelated to any adjustment in the taxpayer's federal taxable income, and (2). Whether the Iowa single sales factor apportionment formula operated to subject the taxpayer to taxation on a greater portion of its net income than is reasonably attributable to taxpayer's business or sources within Iowa.

CONCLUSIONS OF LAW

The first issue involving the Department's authority to make an assessment of additional Iowa tax unrelated to adjustments in federal taxable income involves only the years ending March 31, 1968 and March 31, 1969. The formal tax assessment was issued on December 22, 1972. This assessment was issued within six months from the date of final disposition of controversy between the taxpayer and the Internal Revenue Service with respect to the years in question. However, the taxpayer contends that during this six months period, the Department was not authorized to assess Iowa tax on the ground of rejection of taxpayer's returns filed on a three factor formula basis and requirement of computation of Iowa income on the basis of the Iowa statutory single sales factor formula. The first sentence in §422.25(1) of the Iowa Code provides in relevant part:

> "1. As soon as practicable and in any event within three years after the return is filed the department shall examine it and determine the correct amount of tax, and the amount so determined by the department shall be the tax; . . ."

For the two fiscal years in question, this three year limitation period had expired prior to the issuance of the Department's assessment of December 22, 1972. During this period and in 1972, §422.25(1) provided in the second sentence thereof:

> *"Notwithstanding the periods of limitation for examination and determination heretofore specified,* the department shall have six months from the date of final disposition of any controversy between the taxpayer and the internal revenue service with respect to the particular tax year to make *the* examination and determination. (emphasis supplied).

The taxpayer contends that this above quoted second sentence of §422.25(1) of the Code only authorized the Department to make adjustments during the six months period which result from a change in federal taxable income and do not authorize the Department to make an adjustment and concomitant assessment due to a change from the three factor to single factor formula unrelated to any "controversy" with the Internal Revenue Service. However, taxpayer's contention ignores the plain meaning of this second sentence of §422.25(1) which clearly gives the Department additional time to make whatever adjustments, whether related to federal taxable income or not, necessary for a proper determination of taxpayer's Iowa income tax liability. To adopt taxpayer's contention is to read into this unambiguous statute words which are not there. Consequently, the Director concludes that the Department properly could, during the six months period, determine that the taxpayer improperly apportioned income to Iowa on the basis of a three factor formula and, thereby, assess taxpayer additional tax and interest on the basis of the Iowa single sales factor formula. The assessment of December 22, 1972, was timely made.

The second issue for the Director of Revenue to resolve on taxpayer's appeal is whether the taxpayer is entitled to file its income tax returns for all the fiscal years in question on the basis of an apportionment formula giving equal weight to sales, property and payroll or whether the Department can properly require the taxpayer to so file on the basis of the statutory single sales factor formula.

The taxpayer contends that a single sales factor formula inherently violates the commerce and due process clauses of the United States Constitution as applied to the states and, in the alternative, contends that it would be

an abuse of discretion by the Director of his authority contained in §422.33(2) of the Iowa Code to refuse the request of taxpayer, which does no manufacturing in Iowa, for permission to use a three factor formula.

A three factor formula consisting of property, payroll, and sales has been expressly held to be valid and constitutional by the United States Supreme Court. *Butler Brothers* v. *McColgan,* 1942, 315 U.S. 501, 62 S.Ct. 701, 86 L.Ed. 991; *General Motors Corporation* v. *District of Columbia,* 1965, 380 U.S. 553, 85 S.Ct. 1156, 14 L.Ed.2d 68. Iowa is the only state requiring apportionment of income on the basis of a single factor formula. Most states allow corporations to file state income or franchise tax returns on the basis of some form of three factor formula, consisting of property, payroll and sales. The formulae in effect in the states differ as to the tax bases to which such formulae apply. In the instant situation, the taxpayer would owe Iowa less tax on the basis of a three factor formula than on a single factor sales formula. Taxpayer, in support of its argument for use of a three factor formula, relies almost totally on *General Motors Corporation* v. *District of Columbia,* supra. While the Supreme Court criticized the use of a single factor sales formula, such criticism was within the context of a statute which did not authorize the use of such a formula, but seemed to require the use of a three factor formula. On the other hand, the following cases support the constitutionality of single factor apportionment formulae: *National Leather Co.* v. *Massachusetts,* 1928, 277 U.S. 413, 48 S.Ct. 534, 72 L.Ed. 935 (Single Property factor); *Underwood Typewriter Co.* v. *Chamberlain,* 1920, 254 U.S. 113, 41 S.Ct. 45, 65 L.Ed. 165 (Single Property factor); *Bass, Ratcliff & Gretton Ltd.* v. *State Tax Commission,* 1924, 266 U.S. 271, 45 S.Ct. 82, 69 L.Ed. 282 (Single assets factor); *Kent-Coffey Mfg. Co.* v. *Maxwell,* 1933, 204 N.C. 365, 168 S.E. 397,

90 A.L.R. 476, aff'd 291 U.S. 642, 78 L.Ed. 1040 (Single property factor); *Ford Motor Co.* v. *Beauchamp*, 1939, 308 U.S. 331, 60 S.Ct. 272, 84 L.Ed. 304 (Single gross receipts factor).

Moreover, because of the differences in the types of apportionment formulae and tax bases among the states, double taxation can and does result. And the use of formulae by other states where the taxpayer does business is not relevant. In *Commonwealth* v. *South Philadelphia Terminal, Inc.*, 1961, 404 Pa. 293, 171 A.2d 758, the Court stated at 171 A.2d 759:

> "The conclusion that the fairness of an allocation formula cannot be determined by consideration of or the effect of a different formula used by another state is most proper. The sole issue is whether Pennsylvania's formula justly allocates to itself a proper portion of the corporation's activities, regardless of the methods used by the other states."

This is also the issue under §422.33(2) of the Iowa Code. For all that appears, apportionment of the taxpayer's income by means of geographical distribution of sales of a unitary business is just as reasonable as the use of other formulae—a position taken by the State Board of Tax Review in *Phillips Petroleum Company* v. *Briggs*, Case No. 47, June 20, 1973. Apportionment formulae are simply approximations of the distribution of the sources of income of a unitary business or the social costs which such business generates. An iron rule of equality of taxation is neither possible nor attainable in this area. Merely because, under some circumstances, the use of a three-factor formula apportions less income to Iowa than the use of a single factor formula is not the test. While it is true that Iowa's single factor formula does not give effect to the

corporation's geographical distribution of property and payroll, there is no constitutional or statutory requirement that it must. "The Constitution is not a formulary". *Wisconsin* v. *J. C. Penney Co.*, 1940, 311 U.S. 435, 444, 61 S.Ct. 246, 85 L.Ed. 267.

The Director of Revenue finds that the Iowa single sales factor formula does not operate to subject taxpayer to taxation on a greater portion of his net income than is reasonably attributable to business or sources within this state. No showing has been made by the taxpayer that he is entitled to the use of a three factor formula over the single sales formula for the years in question. Taxpayer's request for permission to us a three factor formula to apportion income to Iowa is denied.

ORDER

It is hereby Ordered that the Income tax assessment be adjusted and revised for the years in question to be $236,890.00 tax plus interest as provided by law.

Done at Des Moines, Iowa, this 17th day of December, 1974.

/s/ G. D. Bair
G. D. Bair, Director, Iowa Department of Revenue

APPENDIX B

IN THE DISTRICT COURT OF THE STATE OF IOWA
In and for Polk County

EQUITY NO. CE3-1595

MOORMAN MANUFACTURING COMPANY,
Plaintiff,

vs.

G. D. BAIR, DIRECTOR OF REVENUE, STATE OF IOWA,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed December 17, 1976)

NOW on this 17 day of December, 1976, the above captioned cause coming on for trial before the undersigned on the 19th day of August, 1976, the plaintiff Moorman Manufacturing Company represented by Walter R. Brown and John V. Donnelly; the defendant G. D. Bair, as Director of Revenue for the State of Iowa, represented by Harry M. Griger, Assistant Attorney General; and appearing as amicus curiae by special leave of Court is the Iowa Manufacturers Association represented by James L. Rogers, John R. Phillips, and Russell L. Samson; the Court finds it has jurisdiction over the subject matter of this action and the parties hereto, and having heard legal arguments in this matter, having studied the stipulation of facts agreed between parties to be the evidence submitted, having carefully examined the extensive support provided for respective positions by briefs, after long and careful reflection, is now prepared to rule.

This action, putting squarely at issue the constitutionality of Iowa Code Section 422.33, finds its genesis in the defendant's December 17, 1974 order revising and adjusting Moorman's income tax assessment for that corporation's fiscal years of operation ending March 31, 1968 through March 31, 1972. The amount put in issue by that assessment, taxes and interest, totals $321,628.95. Moorman has taken appeal from the defendant's order affirming the revised and adjusted assessment by the provisions of Iowa Code Section 422.29 (1971) which cast this matter before the Court on a *de novo* basis. Because this cause has been submitted on an agreed stipulation of facts, no evidence beyond that in the stipulation was presented or is considered and as the parties to this action have requested by Paragraph 35 of said stipulation, this opinion merely makes findings of fact and conclusions of law but withholds the decretal or judgmental portion of this opinion upon which an appeal can immediately result.

PRELIMINARY FINDINGS OF FACT

The plaintiff, Moorman Manufacturing Company (hereinafter Moorman) is a corporation organized and existing under the laws of the State of Illinois and doing business in Iowa as well as several other states. For the period in question and currently, Moorman's principal source of income was generated by the manufacture and sale of more than eighty different products for feeding livestock and poultry with the greatest portion of those sales centered about the sale of mineral and protein supplements for livestock. Moorman's holdings are as extensive as they are scattered. It owns all of the outstanding stock of Quincy Soybean Co., Quincy, Illinois; the Moorman Manufacturing Company of California, Inc., San Gabriel, California; and Bell Grain and Milling, Inc., of Perris, California. Bell, in turn, owns all the outstand-

ing stock of Bell Milling Corporation of Escondido, California. Moorman's manufacturing facilities are located in five separate plants in three states: Quincy, Illinois; Alpha, Illinois; Comanche, Texas; Hereford, Texas, and Columbus, Nebraska. None of Moorman's manufacture occurs in Iowa. Moorman's products are principally sold directly to farmers and ranchers by its sales force of more than 2,500 salesmen, all paid on a commission basis, in more than thirty states of this country.

During the years in issue, March, 1968 through March, 1972, Moorman conducted a continuous solicitation and sales campaign to potential Iowa customers by its sales force of between 518 and 582 Iowa salesmen and warehousemen. Resulting sales were satisfied by delivery of its product from one to six warehouses in Iowa, located in Stanwood, Plainfield, Goldfield, Marcus, Atlantic, and Knoxville. The products sold in Iowa and delivered from one of the above distribution points were manufactured exclusively by Moorman's Illinois plants.

Due to its widely disbursed business activities Moorman pays income taxes to a number of states in addition to Iowa. It operates, for tax purposes, on a fiscal year basis ending March 31 of each year. Moorman's Iowa income tax returns for fiscal years ending March 31, 1968, 1969, 1970, 1971, and 1972 were all timely filed as required by statute and while the method of computation employed by it did not conform to the requirements of Iowa Code Section 422.33(1), the method used by Moorman was clearly disclosed on its returns for those years. Indeed, Exhibits 1 through 5 relating respectively to tax years March 31, 1968 through March 31, 1972, identify precisely the factors Moorman used to compute its Iowa taxes and cited as authority for so doing "General Motors Corp. v. D.C. U.S. Supreme Court Docket No. 352".

On December 22, 1972, D. G. Brigg's, defendant Bair's predecessor in office, issued an Income Tax Assessment Notice against Moorman relating to plaintiff's tax returns for its fiscal years of 1968 through 1972. That assessment found taxes and interest due from plaintiff respecting those fiscal years in the amount of $321,628.95, since Moorman had chosen to compute its taxes on the basis of a three factor formula and not the single factor sales formula of Iowa Code Section 422.33(1). Plaintiff's appeal from that assessment resulted in a hearing conducted before defendant on October 24, 1974. As mentioned above, it was defendant's December 17, 1974 order affirming the revised assessments which led to the appeal taken here.

The history of Moorman's tax intercourse with Iowa dates back to 1949 when it filed its first income tax return for fiscal year ending March 31, 1949. With approval of the Iowa State Tax Commission, Moorman, after allocating its interest, dividends, rents, and royalties, less expenses related thereto, apportioned the remainder of its net income to the State of Iowa on the ratio that its payroll, property, and sales within Iowa bore to its payroll, property, and sales everywhere through its operations in the United States, giving equal weight (.33) to each element in the ratio. This method of computation was followed for each year from 1949 to March 31, 1960. But at the direction of the State Tax Commission, Moorman computed its income tax obligation for the fiscal years of 1961 through and including 1965 by adherence to the single sales factor formula of Iowa Code Section 422.33(1). Beginning in its fiscal year of 1965, however, Moorman again applied the equally balanced three-factor—property-payroll-sales formula to its income thereafter. To this application of the three factor formula the State Tax Commission did not consent. It was the result of Moorman's

use for its fiscal years of 1968 through 1972 inclusive of the three factor formula that the December 22, 1972 notice of income tax assessment found additional amounts of tax due when recomputation conformed to the single sales factor tax formula of Iowa Code Section 422.33(1).

Based upon the facts submitted, more of which will be discussed in connection with each separately considered legal argument, the parties have presented several questions of law. Classified broadly and in the order in which such questions will be addressed below, we must determine (1) whether the statute of limitations in Iowa Code Section 422.25 defeats recovery by defendant of that portion of its revised assessment respecting Moorman's income for the fiscal years of 1968 and 1969; (2) whether the single sales factor formula of Iowa Code Section 422.33 is facially unconstitutional as in violation of the due process or equal protection clauses of the Fourteenth Amendment to the United States Constitution and the same provisions of the Iowa Constitution and in violation of the Commerce Clause of the Federal Constitution; (3) whether, depending upon the conclusions made concerning facial unconstitutionality, the single sales factor formula of our Code is unconstitutional as applied to Moorman as in violation of the same constitutional injunctions.

We turn to the problems posed by the statute of limitations in Iowa Code Section 422.25.

STATUTE OF LIMITATIONS

Iowa Code Section 422.25 reads, *inter alia*,

"*Computation of tax, interest, and penalties—limitation.*

"1. As soon as practicable and in any event within three years after the return is filed the department shall examine it and determine the correct amount of tax, and the amount so determined by the department shall be the tax; . . . Notwithstanding the periods of limitation for examination and determination heretofore specified, the department shall have six months from the date of final disposition of any controversy between the taxpayer and the internal revenue service with respect to the particular tax year to make the examination and determination."

Of the $321,628.95 the defendant assessed in arrearages by its Income Tax Assessment Notice of December 22, 1972, $62,073.77 is attributable to the defendant's revised assessment for Moorman's fiscal year ending March 31, 1968, and $59,272.03 represents the defendant's increased assessment for Moorman's tax year of 1969.

As noted above, Moorman timely filed its Iowa income tax returns for 1968 and 1969 indicating clearly, although not with defendant's consent, the apportionment formula it applied to income for those years.

Thus the three year statute of limitations in Section 422.25, unaffected by willful omissions or fraud considerations that would bring to bear either a six year or unlimited limitation period, began to run July 31, 1968 and July 31, 1969, and expired July 31, 1971, and July 31, 1972, respectively. Since the Notice of Income Tax Assessment bears the date December 22, 1972, the revised assessment respecting 1968 and 1969 would seem clearly to be uncollectible as beyond the limitation period. The catch is that Moorman's federal income tax returns were the subject of an audit by the United States Internal Revenue Service beginning in June, 1970 which called into question its returns for its fiscal years of 1968 and 1969. The audits were concluded by a written agreement between Moorman and the I.R.S. on or about October

8, 1973. The audit and agreement however resulted in no change which would affect the determination of how Moorman's net income arising from the sale of tangible personal property should be apportioned to the State of Iowa, whether by application of the statutory single sales factor apportionment method or by the three factor formula used by Moorman.

Although the audit and agreement respecting Moorman's income for those years made no difference in its income for Iowa's taxing purposes, by virtue of the federal inquiry the defendant contends the basic three year limitation period no longer applies because the revised assessment for 1968 and 1969 came well before "six months from the date of final disposition of any controversy between the taxpayer and internal revenue service with respect to the particular tax year. . . ." Section 422.25(1), The Code. Acknowledging that the audit produced no results upon which a change might follow in Iowa tax due, the defendant concedes that the audit by the I.R.S. is the only basis for its argument that the general three year limitation does not apply.

It is clear, as Moorman observes, that purpose of extending the primary three year limitation in Section 422.25 six months from the final disposition of any controversy between a taxpayer and the federal internal revenue service, is to allow the state to take advantage of the auditing efforts conducted under federal auspices.

While we believe the director would be remiss in his duties by failing to make "an examination and determination" of tax returns in the three year limitation period all the while awaiting possible institution of similar efforts by the Internal Revenue Service, the six months exception to the three year bar is neatly tailored to allow Iowa tax officials another opportunity in scrutinizing corporate

returns when federal examination of that taxpayer's returns results in adjustments which might present grounds for similar changes in Iowa tax liabilities.

Of course, the case here presents an added difficulty. If the federal audit discloses no information by which Iowa may make additional assessments, does the mere fact a federal audit took place leave the defendant a foothold for making a revised and adjusted assessment, otherwise barred by the limitation prohibition, and allowing him to recompute the corporate taxpayer's liability on the basis of taxing formula criteria different than the taxpayer disclosed in its returns?

We return to the statute for a more careful reading of the words our legislature chose to manifest its intent.

The duty of the department, to be accomplished "as soon as practicable and in any event within three years" from the filing of a corporate taxpayer's returns, is to 'examine' the returns and 'determine' the correct amount of tax. Section 422.25. Notwithstanding this general limitation, the department is given an additional six months which begins upon the resolution of a controversy existing between the taxpayer and Internal Revenue Service to 'examine and determine' the taxpayer's Iowa returns in light of the final disposition made between the taxpayer and Internal Revenue Service. During either the first three year period or a second six months extension, the scope of the department's inquiry respecting the taxpayer's returns is the same—the department must 'examine' and 'determine'.

Webster's Seventh New Collegiate Dictionary 288-9 (1965) defines the verb 'examine' to mean "to inspect closely; to test the condition of; to inquire into carefully. . . ." 'Determine', as a verb, is defined to include the

following actions: "to fix conclusively or authoritatively; to decide by judicial sentence; to settle or decide by choice of alternatives or possibilities; . . . to come to a decision. . . ." *Id.*, at 226.

Because the legislature gave the department the same latitude in reviewing a taxpayer's returns after a federal audit had begun as the department had initially within the original three year examination period, the conclusion would seem inescapable that the department is not limited to a mere *recomputation* of the taxpayer's Iowa liability based upon newly developed federal figures (emphasis added). The department is accorded the authority, as they are in the first instance, to scrutinize and inspect the Iowa returns and decide and fix the amount of tax liability. Thus it is apparent that the department may challenge Moorman's apportionment formula and the tax liability following from its use in the period beyond the three year limitation as within its powers to both 'examine and determine'.

More supportive still of this conclusion is a focus on another aspect of the six months statutory exception. Regarding the nature of the controversy existing between the taxpayer and Internal Revenue Service, Section 422.25 says ". . . the department shall have six months from the date of final disposition of *any* controversy between the taxpayer and the internal revenue service. . . ." (emphasis added).

We cannot help but believe that the broad powers vested in the department to 'examine and determine' anew after a federal audit had begun were powers then constrained to such duties only if the federal audit produced adjusted income which, in turn, might adjust Iowa taxable income. It is plain that the controversies between the

taxpayer and Internal Revenue Service which can result in application of the department's statutory duties are not just certain controversies whose resolution changes the taxpayer's base for Iowa tax purposes but "any controversy" whether a change affecting Iowa tax results or does not result.

In sum, this Court concludes that the defendant properly made his revised assessment using the statutory formula of Section 422.33 on income attributable to Moorman's fiscal tax years ending March 31, 1968 and 1969.

We turn now to the more onerous task of determining the constitutionality of the 'single factor sales' formula of Section 422.33.

CONSTITUTIONALITY

It is necessary at the outset to review the standards by which the constitutionality of legislation is measured. The principles are well known that

> "(r)egularly enacted statutes are accorded a strong presumption of constitutionality. When constitutionality is merely doubtful [courts] will not interfere as it must be shown that legislative enactments clearly, palpably and without doubt infringe upon constitutional rights before an attack will be upheld. Every reasonable basis of support for a statute must be negated by the attacking party."

State v. *Aldrich*, 231 N.W.2d 890, 894 (Iowa 1975) (quoting, *State* v. *Kueny*, 215 N.W.2d 215 (Iowa 1974)); *Lee Enterprises, Inc.* v. *Iowa State Tax Commission*, 162 N.W.2d 730 (Iowa 1968); *Vilas* v. *Iowa State Board of Assessment and Review*, 223 Iowa 604, 273 N.W. 338 (1937); *Cook* v. *Hannah*, 230 Iowa 249, 297 N.W. 262 (1941).

The burden falls upon the party challenging the statute's constitutionality to negative every reasonable basis upon which the statute might be sustained. *State* v. *Hall*, 227 N.W.2d 192, 193 (Iowa 1975); *Green* v. *Shama*, 217 N.W.2d 547 (Iowa 1974); *Keasling* v. *Thompson*, 217 N.W.2d 687 (Iowa 1974); *Lee Enterprises, supra*, at 238. 84 C.J.S. *Taxation* Section 36 at 121 (1954) ("(t)he presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons or classes.")

In the field of taxation, perhaps more than in any other area, legislatures are accorded the greatest deference in constructing workable taxing mechanisms. *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973). In *Madden* v. *Commonwealth of Kentucky*, 309 U.S. 83, 87-8 (1939) the United States Supreme Court observed:

> "The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized. This Court fifty years ago concluded that 'the fourteenth amendment was not intended to compel the states to adopt an iron rule of equal taxation,' and the passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislature arrangement to negative every conceivable basis which might support it." (numerous footnotes omitted).

Mindful as we are of the very delicate and sensitive obligations which we now undertake and fully aware of all presumptions and burdens which run in favor of a declaration of constitutionality of the legislation now at issue, we assume the duty that is ours and turn to the constitutional attack levied by Moorman against Iowa Code Section 422.33. *Marbury* v. *Madison*, 1 (Cranch) 427 (1804).

FACIAL CONSTITUTIONALITY OF SECTION 422.33

Iowa Code Section 422.33 reads:

> *"Corporate tax imposed.* A tax is hereby imposed upon each corporation organized under the laws of this state, and upon every foreign corporation doing business in this state, annually in an amount computed by applying the following rates of taxation to the net income received by the corporation during the income year:
>
> [rates omitted]
>
> "1. If the trade of business of the corporation is carried on entirely within the state, the tax shall be imposed on the entire net income but if such trade or business is carried on partly within and partly without the state, the tax shall be imposed only on the portion of the net income reasonably attributable to the trade or business within the state, said net

income attributable to the state to be determined as follows:

"a. Interest, dividends, rents and royalties (less related expenses) received in connection with business in the state, shall be allocated to the state, and where received in connection with business outside the state, shall be allocated outside the state.

"b. Net income of the above class having been separately allocated and deducted as above provided, the remainder of the net income of the taxpayer shall be allocated and apportioned as follows:

. . . .

"Where income is derived from the manufacture or sale of tangible personal property, the part thereof attributable to business within the state shall be in that proportion which the gross sales made within the state bear to the total gross sales.

"The gross sales of the corporation within the state shall be taken to be the gross sales from goods sold and delivered within the state, excluding deliveries for transportation out of the state."

Iowa Code Section 422.33 taxes corporate net income from the manufacture and sale of tangible personal property using an apportionment method applied to corporations doing business both in the state and out of the state on that portion of net income the statute says is "reasonably attributable" to the business conducted in state. The method described for 'reasonably attributing' net income as between in-state and extra-territorial activity is the fraction defined by manufacturers' in-state sales of tangible personal property, as the numerator, over similar sales of such property made by that manufacturer everywhere

else—the denominator. The resulting fraction is applied to the manufacturer's net income and the result is the income taxable in Iowa. This taxing method is commonly referred to as the 'single-factor sales formula'.

By contrast and for a full understanding of the operation of the single factor sales formula, the apportionment method Moorman employed when filing its tax returns for the years in question is commonly known as the three factor formula. That formula in its operation employs not only sales in Iowa as an indicia of the tax it should pay here but includes two other factors: the payroll of its Iowa personnel and the value of the manufacturer's in-state property holdings. Taking, as an example, then, Moorman's business for its fiscal year ending March 31, 1968, the results in application of the Iowa single sales factor formula and the three factors (sales, payroll, property) formula are seen to produce readily apparent differences in the tax Moorman must pay this state.

For Moorman's fiscal year 1968, it reported total gross sales from all of its operations in this country of $97,719,800. Of that sum, $22,102,015 represented sales in Iowa. Application of the single factor formula results in the fraction of approximately 1/5—as a percentage, 22.6177%. This factor is multiplied against Moorman's net income with the product representing the taxable income to which Iowa applies its rates.

The three factor approach used instead by Moorman works this way: the Iowa sales percentage (22.6177%) is given one-third weight (.33 x 22.6177%), as are the elements of payroll and property. Moorman's Iowa property holdings for that year represent merely 1/25 of the property it owned everywhere—4.0753%. Moorman's payroll for that year amounted to $23,919,381 of which $3,-

739,426 was paid to its Iowa salesmen and warehousemen. As a fraction between 1/6 and 1/7 of its entire year's payroll went to Iowa wage earners—15.6335%. The property factor and payroll factor are given equal weight with the sales factor so that the weighted percentage applied to Moorman's net income for that year is: (.33 x .226177) + (.33 x .40753) + (.33 x .156335) or .141088, or 14.1088%. This decimal contrasts sharply with the product gained from the single sales factor alone; here .226177.

When these respective products are applied against Moorman's net income for the fiscal year of 1968, the determination would yield—as should readily be clear—Iowa taxable income of $1,548,284 and not the $998,411 which would follow from applying the evenly weighted three factor product. The difference between the formulae applied result in a difference to Iowa of some $549,873 of taxable income and to Moorman in many thousands of dollars in additional tax liability.

These figures show roughly the contrast between the apportionment mechanism Moorman used from 1968 through 1972 and the one later applied by the defendant. Against this backdrop we proceed to the individual constitutional arguments Moorman makes.

EQUAL PROTECTION

Moorman assails the single sales factor tax apportionment method as in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution and the similar clause in the Iowa Constitution, Article I, Section 6. It contends the classifications established by Section 422.33 invidiously discriminate against it and in favor of solely Iowa based manufacturers who ship most or all of their goods out of state since all of

plaintiff's sales in state are taxed at 100% and those of hypothetical Iowa manufacturers who ship totally out-of-state are not taxed in Iowa at all.

When constitutional provisions of both the federal Constitution and Iowa Constitution contain a similar guarantee, "they are usually deemed to be identical in scope, import and purpose", and cases interpreting the federal standard are consulted "for such light and guidance as they may afford." *Davenport Water Company* v. *Iowa State Commerce Commission*, 190 N.W.2d 583, 593 (Iowa 1971).

In determining whether legislative treatment of various objects sought to be addressed within a statutory scheme violates equal protection, the United States Supreme Court has said:

> "'1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality.'" *Morey* v. *Doud*, 354 U.S. 457 (1957) (citing *Lindsey* v. *Natural Carbonic Gas Co.*, 220 U.S. 61 (1911)).

We look to the statute to determine the nature of classifications it prescribes.

Section 422.33, The Code, imposes a tax "upon each corporation organized under the laws of this state, and

upon every foreign corporation doing business in this state. . . ."

It is readily apparent that the statute in question focuses on the classification of 'corporations'. Since classifying corporations for different tax treatment than individual persons has most recently been sustained in *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973), the Iowa scheme taxing corporations cannot be challenged merely because corporations are taxed. Nor does the fact that Section 422.33 establishes a graduated tax on corporate incomes lead to a finding of an invidious classification, for all corporations, without regard to any other factors, have been taxed by the same apportionment mechanism—the single sales factor. See *Illinois Central Ry. Co.* v. *Minnesota*, 309 U.S. 157 (1940). The simple matter is that for purposes of classification, the legislature has singled out the income of all "corporations" as the basis on which the single sales factor is to apply; and while application of the formula yields differing amounts of tax due, for equal protection analysis, all corporations are similarly situated and are accorded exactly the same tax treatment.

This Court concludes that Iowa Code Section 422.33 on its face creates no classifications which may be found to violate Moorman's rights to equal protection of the law under either the Fourteenth Amendment of the United States Constitution or Article I, Section 6 of the Iowa Constitution. Indeed, Moorman's complaints concerning the operation of Section 422.33 would seem to be complaints shared by all corporations taxed by the statute whose operations are multi-state in extent. To that end Moorman's next attack is premised on the due process clauses of both Iowa and United States Constitutions.

DUE PROCESS

In approaching Moorman's due process assignments we are haunted by the unquieted spirit of *Lochner* v. *State of New York*, 198 U.S. 45 (1905). It is remarked that if we find the single sales factor statute unconstitutional, our judgment should address which of the myriad of tax formulae currently in use should be that Iowa is left to follow. If it is decided the present statute is unconstitutional, we are petitioned to point the way our taxing systems should be written.

We decline this invitation as it has been rejected so many times before (*West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937); *Olsen* v. *State of Nebraska*, 313 U.S. 236 (1941); *Lincoln Federal Labor Union* v. *Northwestern Co.*, 335 U.S. 525 (1949); *Giboney* v. *Empire Storage Co.*, 336 U.S. 490 (1950); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955)) and note that this Court is not ordained to sit as the "super legislature" of a prior era in testing the ". . . wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions." *Griswold* v. *State of Connecticut*, 381 U.S. 484 (1965); *City National Bank of Clinton* v. *Iowa State Tax Commission*, 251 Iowa 603, 102 N.W.2d 381 (1960); 51 Am. Jur. *Taxation* Section 47 (1944). We determine only whether Section 422.33 is unconstitutional.

In subjecting Moorman's arguments to due process scrutiny the initial inquiry must be whether "the taxing power exerted by the state bears a relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return." *State of Wisconsin* v. *J. C. Penney Co.*, 311 U.S. 435, 444 (1940). As said in *Northwestern States Portland Cement Company* v. *State*

of Minnesota, 358 U.S. 450, 464-5 (1959) denying plaintiff's 'due process' attack,

> "The taxes [there] imposed are levied only on that portion of the taxpayer's net income which arises from its activities within the taxing state. These activities form a sufficient 'nexus between such a tax and transactions within a state for which the tax is an exaction.' *State of Wisconsin* v. *J. C. Penney Co.,* [supra]. It strains reality to say, in terms of our decisions, that each of the corporations here was not sufficiently involved in local events to forge 'some definite link, some minimum connection' sufficient to satisfy due process requirements."

See also *General Motors Corporation* v. *State of Washington,* 377 U.S. 436 (1964); 51 Am. Jur. *Taxation* Section 92 (1944).

Of course, Moorman, first and foremost, is accorded the not invaluable right to do business in the State of Iowa. The record shows its sales in Iowa are substantial. It is given the protection of Iowa laws with resort to the Iowa court system if it determines court powers are needed to protect its corporate rights—as here. It is certain that Moorman's business presence and activities in Iowa with this State's consent constitute the "minimum connection" by which Iowa can constitutionally levy a corporate tax.

The more narrow question presented, however, acknowledging that ". . . the tax in practical operation has relation to opportunities benefits [and] protection conferred or afforded by [Iowa is whether] the tax is fairly apportioned to the commerce carried on within [this State]." *Norfolk & Western Railway Co.* v. *Missouri State Tax Commission,* 390 U.S. 317, 325 (1968) (fn. 5).

Said further by the *Norfolk & Western Railway* Court, addressing a Missouri *ad valorem* tax on railroad rolling stock

> "In some cases the Court has concluded that States have, in fact, cast their tax burden upon property located beyond their borders. [citing cases] The taxation of property not located in the taxing State is constitutionally invalid, both because it imposes an illegitimate restraint on interstate commerce and because it denies to the taxpayer the process that is his due.[5] A State will not be permitted, under the shelter of an imprecise allocation formula or by ignoring the peculiarities of a given enterprise, to 'project the taxing power of the state plainly beyond its borders.' [cited case] Any formula used must bear a rational relationship, both on its face and in its application, to property values connected with the taxing State."

We return to the facts of Moorman's tax predicament to determine whether the State of Iowa imposes its tax on activities fairly apportioned to Moorman's presence here or whether the single sales factor tax demands more than this State can rightfully ask.

It is useful at this point to remember that while Moorman's sales in Iowa constitute roughly one-fifth of its total interstate sales, all of the goods sold in Iowa are manufactured in Illinois. Taking Moorman's fiscal tax year of 1968 again, Moorman contends, respecting the Illinois manufactured goods sold here, that the Iowa tax recognizes none of the manufacturing inputs (payroll and property) of the Illinois process and taxes only the final end and *raison d'etre* of its production efforts; e.g. sales. Thus Moorman asserts that factors, at least as valuable as sales

used in determining the proportion of taxes it should pay to this State, are left entirely out of the Iowa tax equation. It submits this documentation: For its fiscal year of 1968 the percentage of Moorman's payroll associated with its Illinois operations was 41% of its payroll everywhere; the Iowa payroll percentage was 15.63%. Of its property everywhere, that located in Illinois represented 84.29%, while that in Iowa was a mere 5.27%. Finally its sales in Iowa for that year were 21.88% of its sales everywhere. Yet in light of Moorman's relatively small property holdings and payroll contributions in Iowa (none of which are attributable to the manufacture of goods sold here), this State taxes 100 percent of in-state sales (21.88% of income for 1968), which are to a greatest degree attributable to Illinois plant and personnel inputs. Put slightly different, considering total Iowa and Illinois property and payroll alone, Iowa payroll represents but 27.61% while Illinois payroll, substantially higher, runs at 72.39% of total payroll between these two states. Illinois property predominates in balance with 94.11% located here as between it and this state; Iowa property remains only a miniscule 5.89%. But because the Iowa single sales factor tax admits of neither the property nor payroll inputs of Illinois plant and labor as part of its formula, each dollar in sales of Moorman's goods in Iowa is taxed at 100% while nearly 75% of Moorman's payroll and 30% of its capital is used in the manufacture of the goods taxed here.

While accepting the right of Iowa to tax its corporate income for the services this State renders, it maintains that Iowa cannot tax *all* of Moorman's income because only a small proportion of servicing inputs arise from its relation with this State. Since the largest quantum of capital and labor respecting its product sold here results

from its Illinois relationship, the Iowa apportionment formula fails to reasonably apportion profits traceable to Illinois operations and taxes those activities occurring in Illinois. In this sense, says Moorman, the single sales factor taxes more than that which should be fairly apportioned to Iowa and, as a consequence, violates its constitutional rights of due process under both United States and Iowa Constitutions.

We agree.

Perhaps the closest to confirmation of the holding here reached comes from *General Motors Corporation* v. *District of Columbia*, 380 U.S. 553 (1965). At issue there was a regulation formulated by the Tax Commissioners of District of Columbia pursuant to the District of Columbia Income and Franchise Tax Act of 1947. The statute provided that "(t)he measure of the franchise tax shall be that portion of the net income of the corporation . . . as is fairly attributable to any trade or business carried on or engaged in within the District and such other net income as is derived from sources within the District." .The Commissioner's regulation, however, taxed income from the sale of tangible personalty for any particular year on the basis of a single sales factor, which operated in the same manner as Iowa's formula. In striking the regulation as exceeding the statutory authorization permitting a tax only on income "fairly attributable" to the District of Columbia, the Supreme Court left no doubt that the single sales factor apportionment method transgressed more than the statute at issue. Through the discriminating use of dicta, that Court marked the single sales factor formula as potentially violative of constitutional guarantees, although stating they took no position as to the constitutionality of a state tax scheme premised on the use of the single sales factor alone. *Id.*, at 561.

While the constitutional implications of that decision extend more to problems associated with violation of the Commerce Clause (of which more later), so far as 'due process' is here concerned, the Court commented:

> "The use of an apportionment formula based wholly on the sales factor, in the context of general use of the three-factor approach, will ordinarily result in multiple taxation of corporate net income; for the States in which the property and payroll of the corporation are located will allocate to themselves 67% of the corporations income, whereas the jurisdictions in which the sales are made will allocate 100% of the income to themselves." *Id.*, at 559-60.

The plaintiff in that case, General Motors Corporation, stood in exactly the same position as plaintiff here. General Motors' sales in the District of its automobiles were in the millions of dollars and the District tax was imposed upon 100% of such sales. The manufacturing process in that case however, like here, was conducted totally outside the District. The concern the *General Motors* court had with the use of the single sales factor formula was that of the reasonableness of apportionment. Speaking more to Commerce Clause issues, the Court made clear that taxing schemes must fairly apportion corporate incomes so that multiple taxation does not result, as we have found it does in this case.

Finding that Iowa Code Section 422.33 imposes taxes on business activity carried on outside Iowa borders, and therefore violates 'due process', we move on to consider the Commerce Clause assignments.

COMMERCE CLAUSE

In *Northwestern States Portland Cement Company* v. *State of Minnesota*, 358 U.S. 450 (1959) the Supreme Court was called upon to determine the constitutionality of state net income tax laws which levied taxes on that portion of an out-of-state corporation's net income earned in and fairly apportioned to business activity in the forum state. The attack made centered on 'commerce clause' and 'due process' questions. Reviewing the appropriate 'commerce clause' standards the Court detailed:

> "It has long been established doctrine that the Commerce Clause gives exclusive power to the Congress to regulate interstate commerce, and its failure to act on the subject in the area of taxation nevertheless requires that interstate commerce shall be free from any direct restrictions or impositions by the States. Gibbons v. Ogden, 1824, 9 Wheat. 1, 6 L.Ed. 23. In keeping therewith a State 'cannot impose taxes upon persons passing through the state, or coming into it, merely for a temporary purpose' such as itinerant drummers. [case cited]. Moreover, it is beyond dispute that a State may not lay a tax on the 'privilege' of engaging in interstate commerce [case cited]. Nor may a State impose a tax which discriminates against interstate commerce either by providing a direct commercial advantage to local business [cases cited], or by subjecting interstate commerce to the burden of 'multiple taxation' [cases cited]. Such impositions have been stricken because the States, under the Commerce Clause, are not allowed 'one single tax-worth of direct interference with the free flow of commerce.' [case cited]." *Id.*, at 458.

For many intents and purposes, the test of a state's taxing law for Commerce Clause analysis is the same as it is for 'due process' purposes. Thus, as said in *Norfolk & Western Railway Co.* v. *Missouri State Tax Commission, supra,*

> "The taxation of property not located in the taxing State is constitutionally invalid, both because it imposes an illegitimate restraint on interstate commerce and because it denies to the taxpayer the process that is his due.[5]
>
> * * *
>
> [fn. 5] We have said: "The problem under the Commerce Clause is to determine 'what portion of an interstate organism may appropriately be attributed to each of the various states in which it functions.' . . . . So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing State." 390 U.S., at 325.

Consideration of these Commerce Clause strictures requires, as it did with 'due process' investigation, that the Iowa single sale factor apportionment method be shown that its application ". . . has resulted in such gross overreaching, beyond the values represented by the intrastate [activity] purported to be taxed, as to violate the Due Process and Commerce Clauses of the Constitution." *Id.*, at 326.

We have seen, considering Moorman's 'due process' challenge above, that the Iowa apportionment method, in taxing plaintiff's in-state sales, imposes taxes on factors at least as valuable as the 'sales' criterion. These factors

were identified as Moorman's capital and labor or in terms of a three factor formula—property and payroll. And as this case on its facts clearly displays, all of Moorman's property and payroll used to produce the livestock products sold here are located in Illinois. As we found above and in terms of scenario posed in *General Motors Corporation* v. *District of Columbia,* supra, at 559-60:

> "The use of an apportionment formula based wholly on the sales factor, in the context of general use of the three-factor approach, will ordinarily result in multiple taxation of corporate net income; for the States in which the property and payroll of the corporation are located will allocate to themselves 67% of the corporation's income, whereas the jurisdictions in which the sales are made will allocate 100% of the income to themselves."

Since Illinois taxes apportion corporate income using the three factor apportionment method, S.H.A., Sections 120-3-304 612-(3), Moorman finds its income taxed by both Iowa and Illinois exactly as the *General Motors* Court described.

We find and hold that the single sales factor of Iowa Code Section 422.33 taxes values beyond those which may be justly allocated to intrastate Iowa activity; and application of the formula results in "gross overreaching" by this State of conduct interstate in character. We conclude Iowa Code Section 422.33 on its face violates the Commerce Clause to the United States Constitution.

Another aspect of the Commerce Clause is implicated by the Iowa taxing mechanism; the burden cast upon interstate commerce by the spectre of "multiple taxation." *J. D. Adams Mfg. Co.* v. *Storen,* 304 U.S. 307, 311-12 (1938), striking an indiscriminate and unapportioned 'privilege'

tax on gross receipts from commerce, put the rule this way:

> "The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed and which the commerce clause forbids. We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by Article I, Section 8 of the Constitution."

In recent years a pall has been laid upon the *Adams Mfg.* "risk" of multiple taxation test. The suggestion was made in *General Motors Corporation* v. *Washington,* 377 U.S. 436 (1964) that the mere 'risk' of a taxpayer's income being subjected to double taxation would have to give way to an actual showing that the income, in fact, was bearing taxation from multiple sources. The Court of Appeals of Michigan was confronted with these differing standards in *Michigan Fruit Canners, Inc.* v. *Michigan Department of Treasury,* 53 Mich. App. 1, 218 N.W.2d 385 (1974). That Court considered a Commerce Clause challenge to Michigan's single sales factor franchise tax. Regarding the *Adams* 'risk' rule the Michigan Court noted the most recent United States Supreme Court pronouncement on the subject, *Evco* v. *Jones,* 409 U.S. 91 (1972), revitalized *Adams* and in so doing paid no regard to *General Motors Corporation* v. *Washington,* supra. The Michigan Court concluded the *Adams* rule respecting the risk

of multiple taxation remained "the" rule and applied it to the facts of that case.

Our reading of *Evco* v. *Jones,* supra, compels us to agree with the Michigan Court that *Adams* is the test that must be applied here; although we note that if the Iowa single sales factor apportionment method were sustained by this opinion, both the *Adams* 'risk' test and the *General Motors Corp.* v. *Washington* 'actual taxation' tests would be met.

The facts surrounding Moorman's tax dilemma once again become crucial in demonstrating that Iowa Code Section 422.33 runs afoul of the Commerce Clause "multiple taxation" prohibition.

Looking to Moorman's tax year of 1968 it appears that the corporation's apportionable income (that amount to which the single sales factor is applied and whose product results in Iowa taxable income) for that year amounted to $7,076,510. Since Moorman's Iowa sales relative to sales everywhere were 21.8792%, Iowa taxable income in that year, by statute, should have been $1,548,284. This is the dollar-figure subjected to taxation through use of the single sales factor.

The rub is that Illinois, by use of its equally balanced three factor formula, reserves the right to tax income resulting from Iowa sales because it is in Illinois that the manufacturing process respecting goods sold here occurs—in the form of Illinois property and payroll.

Moorman submits these statistics, to which defendant has stipulated, to show in a compelling manner the taxes both States impose on the same income: For 1968, Moorman's Illinois payroll was equal to 41.00% of its total payroll. For the same year, its property in Illinois amounted to 84.29% of all property it owned. Since the

sales element of the Illinois three factor apportionment formula for 1968 was 0.00% (because only Iowa sales are at issue), Illinois will apportion 41.76% ((.33 x 41.00%) + (.33 x 84.29%) + (.33 x 0.00%)) of income from Iowa sales ($1,548,284) upon which it will apply its tax rate. Upon this same 1968 income, Iowa will impose its tax rates on 100% of that amount.

Thus the percentage of Moorman's 1968 income from Iowa sales taxed by Iowa (100%) added to the percentage of the same income Illinois would tax (41.76%) yields the total percentage of income which must bear a corporate tax between these two states: 141.76%. Applying this sum to Moorman's income from Iowa sales in that year ($1,548,284) makes clear that Moorman, in effect, pays taxes on a hypothetical $2,194,847 when their real dollar income stood at the reported $1,548,284. The amount of sales income bearing the tax burden of these two states in excess of Moorman's Iowa sales income is $646,563

It is this amount (141.76% of real income or $646,563) this Court finds to impermissibly infringe upon Commerce Clause protections. It will not do to say: "The Constitution is not a formulary." (*State of Wisconsin* v. *J. C. Penney,* 311 U.S. 435, 444 (1940)) or to say: "There is nothing in the Constitution which requires a state to adopt the best possible system of taxation." (New York v. Latrobe, 279 U.S. 421, 427 (1929)) when the outcome is as gross and disproportionate as these figures show.

It is upon our return to the teaching of *General Motors Corporation* v. *District of Columbia,* supra, that Justice Stewart's words take on added meaning and leave no doubt of their constitutional intonation: "The use of an apportionment formula based wholly on the sales factor in the context of general use of the three-factor approach will

ordinarily result in multiple taxation of corporate net income. . . ." 380 U.S. at 559.

So with this case.

In rejoinder, it is asserted the Supreme Court has on many different occasions in the past upheld the use of single factor taxing apportionment formulae. Cited are: *Underwood Typewriter Co.* v. *Chamberlain,* 254 U.S. 113 (1920); *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Commission,* 266 U.S. 271 (1924); *National Leather Co.* v. *Massachusetts,* 277 U.S. 413 (1928); *Kent-Coffey Mfg. Co.* v. *Maxwell,* 204 N.C. 365, 168 S.E. 397 (1933) *aff'd* 291 U.S. 642 (1933); and *Ford Motor Co.* v. *Beauchamp,* 308 U.S. 331 (1939). But the common thread running between all cases cited, their age, limits their significance here. To that the Supreme Court made express reference in *General Motors Corporation* v. *District of Columbia,* supra. In observing that multiple taxation of corporate net income was the effect of using the single sales factor approach, the Court drew that conclusion from the fact that the context of states' corporate tax laws in 1965 was generally oriented to the three-factor formulae. Of the thirty-eight states in 1965 levying tax on corporate incomes, twenty-six states used an equally-weighted three factor approach, three others used a substantially similar three factor vehicle. Another three used the two factor sales-property formula and only four taxed income on the basis of geographically defined sales. 380 U.S. 559, fn. 9.

Today the context is even more exaggerated. Of forty-six states levying taxes on corporate income (Nevada, South Dakota, Texas and Wyoming have no corporate income tax) only one, Iowa, retains the use of the single sales factor. In this light, it cannot remain arguable that the caveat sounded by the *General Motors* Court has the impact of mere dicta.

We find and hold that Iowa Code Section 422.33, on its face, threatens the risk of multiple taxation of Moorman's income thereby unduly burdening interstate commerce in violation of Article I, Section 8, Clause 3 of the United States Constitution.

Yet another facet of the Commerce Clause impales the Iowa apportionment method following from the line of cases of *Nippert* v. *City of Richmond*, 327 U.S. 416 (1946) and *Memphis Steam Laundry Cleaner* v. *Stone*, 342 U.S. 389 (1952). These cases may be construed as stating the rule that Commerce Clause protections are violated by burdening the free flow of interstate commerce when State law or municipal ordinance discriminatorily grants to local enterprise benefits which are withheld from interstate competitors.

While Moorman's business in Iowa is subjected to the double tax of both Iowa and Illinois, a similarly situated Iowa interstate manufacturer shipping goods, for example, to Illinois would pay taxes only in Illinois; then on the one-third portion of its business activity there represented by its Illinois sales. Assuming the Iowa based manufacturer made all of its sales extra-territorially, Iowa, because of the single sales factor, would tax none of the activity (represented by sales) that were made in Illinois. The obvious commercial advantage to the Iowa based manufacturer is that it would pay no tax here and be required in a three factor jurisdiction to pay tax merely on the sales component of its business conduct there. Justice Stewart comments on this aspect of the result of single-factor apportionment, saying:

> "Conversely, in some cases enterprises will have their payroll and plant located in the sales-factor jurisdictions and make their sales in three-factor jurisdictions so that only 33% of their incomes will be subject to state taxation. In any case, the sheer inconsistency of the District formula with that generally prevailing may tend to result in the unhealthy fragmentation of enterprise and uneconomic pattern of plant location, and so presents an added reason why this Court must give proper meaning to the relevant provisions of the District Code." 380 U.S., at 560.

It is thus clear that the Iowa Code Section 422.33 single sales factor apportionment method contravenes the Commerce Clause in ways manifest above; and we so hold.

SAVINGS CLAUSE

In view of our holding that Iowa Code Section 422.33(1)(b) is facially unconstitutional for the reasons found above, this Court has serious reservations as to whether Iowa Code Section 422.33(2), allowing the director the discretion of applying a different apportionment formula if the result of application of the single factor formula is inequitable, can operate as a "savings clause" in view of our holdings.

Assuming *arguendo* that Section 422.33(2) could so operate, we observe that of 1,969 corporate income tax returns filed by non-Iowa manufacturers between the years 1968 through 1972 inclusive, the director has allowed only one such corporate taxpayer the privilege of using the three-factor payroll-property-sales apportionment formula expressly condoned by the *General Motors Corporation* v. *District of Columbia*, supra, Court. In balance it must be stated that of the 1,969 corporate tax returns filed for those years the director did authorize use of other apportionment formulae which were neither the single sales factor nor the three factor formula for 90 corporate taxpayers.

We conclude on these facts concerning non-Iowa manufacturers, that the largely unexercised discretion granted the director to exempt a taxpayer from the reach of Iowa Code Section 422.33 cannot save the statute from its remaining unconstitutional infringements respecting corporations not granted license, and from its timely death by this opinion.

SUMMARY OF CONCLUSIONS OF LAW

In view of the factual findings made by this Court throughout this opinion, we conclude:

(1) that Iowa Code Section 422.25 authorizes the defendant to examine and determine Moorman's tax liability for its fiscal years of 1968 and 1969 notwithstanding the three year bar of this section;

(2) that Iowa Code Section 422.33(1)(b) does not violate the Equal Protection Clauses of either United States Constitution or Iowa Constitution;

(3) that Iowa Code Section 422.33(1)(b) is facially unconstitutional in violation of the Due Process Clauses of both the United States Constitution and Iowa Constitution; and

(4) that Iowa Code Section 422.33(1)(b) is facially unconstitutional in violation of the Commerce Clause, Article I, Section 8, Clause 3, of the United States Constitution because it

(a) does not fairly apportion interstate business activity to intrastate tax values;

(b) causes multiple taxation of corporate net income by more than one taxing jurisdiction; and

(c) provides local business with a direct commercial advantage not so enjoyed by interstate business.

(5) that the apportionment percentages to be applied to Moorman's net income for the tax years in controversy in this action shall be those specified in paragraph thirty-four of the stipulation.

In response to these parties' request, no decree is now provided and the Court retains jurisdiction of this matter for ninety days within which time these parties shall come to some agreement as to the amount of Moorman's tax liability. If such agreement is not reached within said period, to begin with the filing of this opinion, the Court shall be notified within five days of the expiration of said period and such further proceedings as are necessary to the decree shall at that time be scheduled.

/s/ A. M. Critelli
Judge, Fifth Judicial District of Iowa

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IN THE DISTRICT COURT OF THE STATE OF IOWA
In and for Polk County

EQUITY NO. CE3-1595

MOORMAN MANUFACTURING COMPANY,
Plaintiff,

vs.

G. D. BAIR, DIRECTOR OF REVENUE,
STATE OF IOWA,
Defendant.

RULING ON JOINT MOTION TO RECONSIDER AND SUPPLEMENTAL FINDINGS

(Filed January 7, 1977)

NOW on this 7th day of January, 1977, the above-captioned matter coming on for hearing before the undersigned on the joint oral motion of the parties, the plaintiff represented by Walter R. Brown and John V. Donnelly, the defendant by Harry M. Griger, and amicus curiae, Iowa Manufacturers Association, by James L. Rogers and Russell L. Samson, the Court having heard legal arguments of counsel and after consideration of additional authorities cited to the Court is now prepared to respond to said joint motion.

On the 17th day of December, 1976, this Court filed its findings of fact and conclusions of law in this matter. Since that time these parties have had an opportunity to examine said findings and conclusions and questions have been raised as to the scope and effect of said ruling. In light of these questions the Court believes some modification of its earlier ruling is now in order.

The requests by counsel for clarification appear to fall along four rough lines of inquiry. Each of these general areas will be separately identified and addressed below.

CORRECTED FINDINGS OF FACT

As part of its findings of fact the Court observed at page 27 of its opinion ". . . that of 1,969 corporate income tax returns filed by non-Iowa manufacturers between the years 1968 through 1972 inclusive, the director has allowed only one such corporate taxpayer the privilege of using the three-factor payroll-property-sales apportionment formula expressly condoned by the *General Motors Corporation* v. *District of Columbia*, supra, Court. In balance it must be stated that of the 1,969 corporate tax returns filed for those years the director did authorize use of other apportionment formulae which were neither the single sales factor nor the three factor formula for 90 corporate taxpayers."

To adequately reflect the facts part of the stipulation, the Court hereby strikes the above quoted language beginning with "In balance . . ." to the end of that paragraph and modifies and expands said ruling by finding the following:

> Of the 1,969 corporate tax returns filed in those years, 91 taxpayers filed on the basis of some other allocation method than the single sales factor. One taxpayer, referred to above, was expressly authorized the use of a three factor formula, while 84 taxpayers were denied resort to three factor apportionment by the director; and three taxpayers made unconsented use of a three factor formula which was put beyond challenge by operation of the statute of limitations.

SCOPE OF UNCONSTITUTIONALITY

Because the Court's December 17, 1976, ruling in this matter leaves questions to these parties' minds on the exact portions of Iowa Code Section 422.33 which was in fact declared to be unconstitutional in said ruling, the Court further delineates the specific aspect of Section 422.33 found to be infirm.

While expressed in the original ruling to be Section 422.33(1)(b) which the Court found defective, the specific portion of Section 422.33(1)(b) which was at issue and found facially unconstitutional was the third full paragraph of that section reading as follows:

> Where income is derived from the manufacture or sale of tangible personal property, the part thereof attributable to business within the state shall be in that proportion which the gross sales made within the state bear to the total gross sales.

Thus, the balance of Section 422.33 remains unaffected, hence valid, by the December 17 ruling.

THE VALIDITY OF REMAINING PORTIONS OF SECTION 422.33 AS A VIABLE TAXING STATUTE

In light of the confined parameters of this Court's December 17, 1976 ruling the question has been presented as to whether the remainder of Section 422.33 leaves the State of Iowa with a viable corporate taxing statute.

We think the answer to be clear and certain that the unaffected remainder of Section 422.33 itself presents a workable and valid taxing power without regard to the now excised sales factor apportionment method. That conclusion is premised on the language of Section 422.33(1).

Section 422.33(1) states:

> If the trade or business of the corporation is carried on entirely within the state, the tax shall be imposed on the entire net income, but if such trade or business is carried on partly within and partly without the state, the tax shall be imposed only on that portion of the net income reasonably attributable to the trade or business within the state. . . .

Since Moorman will now be required to apportion their prior years' income on the basis of the percentages found in paragraph 34 of the stipulation the amount Moorman shall hereinafter apportion to the State of Iowa is identified in the above quoted portion of 422.33(1) as that which is "reasonably attributable" to the trade or business Moorman conducts within Iowa borders. No serious question remains that the standard of Section 422.33(1) defining the income thus to be apportioned as that "reasonably attributed" to Iowa presents constitutional problems. The 'reasonably attributable' apportionment method identified there and in Section 422.33(2) presents a legitimate method of allocating income even without regard to the now stricken but more specific 'sales factor' method existing merely as the legislatively constructed mechanism by which reasonable attribution was measured. The 'reasonably attributable' apportionment method remaining as vital as ever poses no problems for a standard sufficient to withstand full constitutional scrutiny. *Elk Run Telephone Company* v. *General Telephone Company*, 160 N.W.2d 311 (Iowa 1968).

Standing as it does, Iowa Code Section 422.33 leaves the defendant full power to apportion and tax plaintiff's income.

PROSPECTIVE OPERATION OF COURT'S RULING

Fully aware of the immediate and far reaching ramifications of the December 17 ruling, the Court is inclined to believe some pronouncement as to the application of the ruling should be made.

Evidence presented by the defendant in light of our earlier ruling shows compellingly the damage to state finances and efficient government that will result if this ruling is left to operate in its full retrospective breadth. We are convinced by such evidence and awakened to the serious and far reaching consequences such a looming catastrophe presents to this State.

We are not however without power to limit the damage that surely will be visited upon the public fisc. Increasingly courts have been called upon to limit the effect in the change of the construction of a statute by announcing the operation of the new rule of law as prospective only. See *Lemon* v. *Kurtzman*, 411 U.S. 192 (1973) and *Linkletter* v. *Walker*, 381 U.S. 618 (1965). And increasingly it has been recognized that prospective application of a new rule should apply as well to cases sounding of constitutional import. *Linkletter*, at 628. That view is premised on the reality that a ruling of unconstitutionality "is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration." *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371, 374 (1940).

Iowa cases have recognized that a court may make a decision operational on a prospective basis alone. That rule announced in *State* v. *Knox*, 186 N.W.2d 641 (Iowa 1971) is not by its terms limited to cases involving criminal conduct. See also, *Linkletter* v. *Walker*, supra, at 627;

21 C.J.S. *Courts* Section 194 at 327-28 (Supp. 1976). Nor should the rules be different in a case such as this.

It has been long recognized by similar cases from other jurisdictions that the particular urgencies attending public financial well-being and the threatened fiscal embarrassment if not insolvency of public institutions created by a ruling of unconstitutionality require that the new rule of law be mediated in its rigor by a declaration of the scope of its operation. *City of Tempe* v. *Del E. Webb Corporation*, 284 P.2d 477 (Ariz. 1971); *Southern Pacific Company* v. *Cochise County*, 377 P.2d 770 (Ariz. 1963); *Oklahoma County* v. *Queen City Lodge No. 197, I.O.O.F.*, 156 P.2d 340 (Okla. 1945); 21 C.J.S. *Courts* Section 194 (b) (1940, Supp. 1976).

We believe the overriding equities presented favor the defendant's view that the Court's ruling herein be limited to operating only in a prospective manner. But we find and hold that plaintiff Moorman should have the benefit of the ruling it generated.

We therefore find and hold that the Court's ruling herein which holds the third full paragraph of Iowa Code Section 422.33(1)(b) facially unconstitutional shall be applied prospectively, with the exception that this holding shall apply to Moorman.

The benefit of this ruling shall not be granted to those corporations who have not taken or can take no timely steps to assert or protect their rights by virtue of the filing of a claim for refund, pursuant to Iowa Code Section 422.73, or protest, pursuant to Iowa Code Section 422.28. But a taxpayer who has so protected or may so protect his rights whether by appeal, judicial review, protest, or claim for refund shall be entitled to a refund of tax paid on only that amount resulting from the dif-

ference in application of the single sales factor method of apportioning that taxpayer's income and other constitutionally appropriate apportionment formulae applied with the consent of the defendant's director. Iowa Code Section 422.33(2).

/s/ A. M. Critelli
Judge, Fifth Judicial District of Iowa

Original filed

Copies to:

Walter R. Brown
John V. Donnelly
Harry M. Griger
James L. Rogers
Russell L. Samson

IN THE DISTRICT COURT OF THE STATE OF IOWA
In and for Polk County

EQUITY NO. CE3-1595

MOORMAN MANUFACTURING COMPANY,
Plaintiff,

vs.

G. D. BAIR, DIRECTOR OF REVENUE,
STATE OF IOWA,
Defendant.

JUDGMENT AND DECREE

(Filed January 7, 1977)

NOW on this 7th day of January, 1977, this matter comes before the Court for purposes of entry of a judgment and decree upon which an appeal can immediately result, and the Court, being fully advised in the premises, hereby concludes as follows:

IT IS ORDERED, ADJUDGED, AND DECREED that the Court's Findings of Fact and Conclusions of Law, dated December 17, 1976, as modified and supplemented by the Court's Supplemental Findings, dated January 7, 1977, be incorporated herein by reference as if set forth in full.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that defendant have judgment against plaintiff for $3,975 Iowa income tax plus interest of $571 computed through January 31, 1977, for a total of $4,546 and that interest continue to accrue as provided by Section 422.25, Code of Iowa, 1973, until said judgment is paid.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that costs be assessed one-half to plaintiff and one-half to defendant.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the bond filed herein by plaintiff is hereby discharged.

/s/ A. M. Critelli
Judge, Fifth Judicial District of Iowa

APPENDIX C

IN THE SUPREME COURT OF IOWA

117

60220

MOORMAN MANUFACTURING COMPANY,
Appellee,

v.

G. D. BAIR, DIRECTOR OF REVENUE,
STATE OF IOWA,
Appellant.

(Filed May 25, 1977)

Appeal from the Polk District Court—Anthony M. Critelli, Judge.

The Director of Revenue appeals from ruling of the trial court that the Iowa single-sales-factor formula was facially unconstitutional in violation of due process clauses of the federal and Iowa Constitutions and commerce clause of the federal constitution. Moorman cross appeals from rulings adverse to it.— Reversed on Director's appeal and affirmed on Moorman's cross appeal.

Richard C. Turner, Attorney General, George W. Murray, Special Assistant Attorney General, Harry M. Griger, Assistant Attorney General, for appellant.

Walter R. Brown and John V. Donnelly, of Swift, Brown and Winick, of Des Moines, for appellee.

James L. Rogers and Russell L. Samson, of Rogers and Phillips, of Des Moines, and Philip B. Kurland, Walter

V. Schaefer, and Walter Hellerstein, of Rothschild, Barry & Myers, of Chicago, Illinois, attorneys on brief for Amicus Curiae.

En banc.

MASON, J.

The fundamental issue on this appeal concerns the constitutionality, facially and as applied to the circumstances present herein, of certain provisions of the Iowa corporate income tax scheme. The issue stems from the district court's ruling that the Iowa single-sales-factor formula was facially unconstitutional in violation of due process clauses of the federal and Iowa Constitutions and commerce clause of the federal constitution. The Director of Revenue (Director) appeals from this adverse ruling and plaintiff cross-appeals from rulings adverse to it. The facts were stipulated in the proceedings had in the district court and show the following.

Plaintiff, Moorman Manufacturing Company (hereinafter Moorman), is an Illinois corporation which was doing business in Iowa and elsewhere. Its principal source of income during the fiscal years in question, March 31, 1968 through March 31, 1972, was derived from the manufacture and sale of some 80 different products for feeding livestock and poultry. It is what is commonly referred to as a "unitary" business, that is, its income arises from sources and activities carried on in several states.

During the years involved Moorman had five manufacturing plants located in Illinois, Texas and Nebraska. Its products were sold by more than 2500 salesmen, employees of Moorman, in more than 30 states during the years in question.

It carries on substantial activities in the state of Iowa. With a force of over 500 employees in this state Moorman engages in continuous solicitation of Iowa customers. After sales are negotiated delivery to Iowa customers is typically made from one of the six warehouses that Moorman operates in the state. These warehouses located at Stanwood, Plainfield, Goldfield, Marcus, Atlantic and Knoxville are maintained by Moorman's employees. It did no manufacturing in Iowa. The products that Moorman sells in Iowa are all manufactured in Illinois.

Iowa imposes a tax upon the net income of domestic corporations and foreign corporations doing business in the state. Section 422.33, The Code, 1975. A corporation's "net income" is based upon its "taxable income" as computed for federal tax purposes with an allowance for certain adjustments. Section 422.35. When the trade or business of a corporation is carried on entirely within the state, the corporation is subject to Iowa taxation on the entire amount of its net income. Section 422.33(1). However, when a corporation's trade or business is carried on partly within and partly without the state, it is subject to taxation only on that portion of its net income "reasonably attributable to" the trade or business within the state. Section 422.33(1).

Two computational steps are prescribed by section 422.33(1) for determining that portion of a corporation's net income which is reasonably attributable to its Iowa activities. First, certain income, the geographical source of which is easily identifiable, is allocated to the appropriate state. Section 422.33(1)(a). The second step allocates the remaining net income in one of two ways, depending upon the nature of the corporation's activities. Where, as here, the corporation's income is derived from the manufacture or sale of tangible personal property, the

portion of its net income attributable to its Iowa activities "shall be in that proportion which the gross sales made within the state bear to the total gross sales." Section 422.33(1)(b). The statute defines "gross sales of the corporation within the state" as the "gross sales from goods delivered within the state, excluding deliveries for transportation out of the state." If a taxpayer believes this apportionment formula operates so as to subject him to taxation on a greater portion of his net income than is reasonably attributable to his Iowa activities, provision is made for an application for an alternative method of allocation. Section 422.33(2).

Moorman filed its first income tax return with the state of Iowa for its fiscal year ended March 31, 1949. Pursuant to approval of the Iowa State Tax Commission, Moorman, after allocating its interest, dividends, rents and royalties (less related expenses) within and without the state of Iowa, apportioned the remainder of its net income to the state of Iowa on the ratio that its payroll, property and sales, as computed by Moorman, within the state of Iowa bore to its payroll, property and sales everywhere in the United States, as computed by Moorman, giving equal weight (.33) to its computed payroll, property and sales factors. This method was used by Moorman in each successive income tax return filed with the state of Iowa up to and including the income tax return filed for its fiscal year ended March 31, 1960.

For its fiscal years ended March 31, 1961, 1962, 1963 and 1964, Moorman determined its income from the sale of tangible personal property in this state pursuant to the single-sales-factor formula provided for in section 422.33 (1), The Code, at the direction of the Iowa State Tax Commission.

However, beginning in its fiscal year of 1965 Moorman again applied the three-factor-property-payroll-sales formula in computing its income from the sale of tangible personal property attributable to Iowa and has applied such formula in each succeeding return filed to date, including those filed for the years in issue. The State Tax Commission did not consent to this application of the three-factor formula.

Moorman appealed to the Polk District Court from an order issued by the Director relating to Moorman's corporate income tax returns for its fiscal years ending March 31, 1968, 1969, 1970, 1971 and 1972 which required Moorman to apportion to Iowa for Iowa income tax purposes for those years its net income derived from the manufacture and sale of tangible personal property by use of the single-sales-factor formula provided for in section 422.33 (1)(b), The Code.

Moorman's appeal to the district court involved an attack on the Iowa single-sales-factor formula on three basic grounds which were: (1) The Iowa single-sales-factor formula is facially unconstitutional; (2) The Iowa single-sales-factor formula is unconstitutional, as applied to Moorman's net income; and (3) The failure of the Director to allow Moorman the use of an alternative apportionment formula constituted an abuse of the Director's discretion granted him under section 422.33(2), The Code, 1975.

The three-factor formula employed by Moorman in computing its income from the sale of tangible personal property attributable to Iowa for the years 1968 through 1972 is explained by the Director in his brief and argument in this fashion: A unitary multi-state corporation computes its total net business income from all sources

according to the laws of the taxing state. The corporation then computes a payroll factor, the numerator of which is the payroll in the taxing state and the denominator of which is the total corporate payroll everywhere. The corporation then computes a property factor, the numerator of which is the value of the property in the taxing state and the denominator of which is the total corporate property value located everywhere. Property rented by the corporation from others is generally included in the property factor under special rules. The corporation then computes a sales or gross receipts factor, the numerator of which is the gross sales or receipts in the taxing state and the denominator of which is the total corporate gross sales or receipts everywhere.

In an effort to afford a better understanding of the results of the application of the single-factor formula and the three-factor approach we refer to the following discussion as set forth in the trial court's findings.

Moorman reported total gross sales from all of its operations in this country for the fiscal year 1968 of $97,719,800. Of that sum $22,102,015 represented sales in Iowa. Application of the single-factor formula results in the fraction of approximately 1/5—as a percentage, 22.6177%. This factor is multiplied against Moorman's net income with the product representing the income to which Iowa applies its rates.

The three-factor approach used by Moorman works in this manner: The Iowa sales percentage (22.6177%) is given one-third weight (.33 x 22.6177%), as are the elements of payroll and property. Moorman's Iowa property holdings for the year represent merely 1/25 of the property it owns everywhere—4.0753%. Moorman's payroll for that year amounted to $23,919,381 of which $3,739,426 was paid to its Iowa salesmen and warehousemen. A fraction between 1/6 and 1/7 of its entire year's payroll went to Iowa wage earners—15.6335%. The property factor and payroll factor are given equal weight with the sales factor so that the weighted percentage applied to Moorman's net income for that year is: (.33 x .226177) plus (.33 x 0.40753) plus (.33 x .156335) or .141088 or 14.1088%. This decimal is thus contrasted to the product gained from the single-sales-factor formula alone; here, .226177.

In ruling on Moorman's various contentions, the district court held, in pertinent part, as follows:

"In view of the factual findings made by this Court throughout this opinion, we conclude:

"(1) * * *;

"(2) That Iowa Code Section 422.33(1)(b) does not violate the Equal Protection Clauses of either United States Constitution or Iowa Constitution;

"(3) That Iowa Code Section 422.33(1)(b) is facially unconstitutional in violation of the Due Process Clauses of both the United States Constitution and Iowa Constitution; and

"(4) That Iowa Code Section 422.33(1)(b) is facially unconstitutional in violation of the Commerce Clause, Article I, Section 8, Clause 3, of the United States Constitution because it

"(a) does not fairly apportion interstate business activity to intrastate tax values;

"(b) causes multiple taxation of corporate net income by more than one taxing jurisdiction; and

"(c) provides local business with a direct commercial advantage not so enjoyed by interstate business.

"(5) * * *."

The following is an overview of the issues presented herein by the contentions asserted in both appeals:

1. *Facial Constitutionality—Due Process.*

The Director maintains the district court's determination that the exclusive use of the sales-factor formula for allocating the income of a multi-state corporation to the appropriate states, mandated by section 422.33(1)(b), was, on its face, violative of the due process clauses of the Iowa and federal constitutions, is erroneous as a matter of law. Specifically, the Director maintains Moorman's argument, adopted by the district court, that section 422.33(1)(b) taxes income-producing activities wholly outside the boundaries of Iowa and thus violates the constitutional principle of due process, is not supported by and is contrary to case law authority.

2. *Facial Constitutionality—Commerce Clause.*

As noted, the district court held, on three separate grounds, that section 422.33(1)(b) violated, on its face, the commerce clause of the federal constitution. The Director maintains the "test" used to determine the constitutionality of an income apportionment formula when challenged as violative of due process is the same "test" utilized when such a formula is analyzed with respect to a possible violation of the commerce clause. As a result, the Director's contention that section 422.33(1)(b) does not violate the principle enunciated in the commerce clause is buttressed by the same arguments and authorities set out in the "due process" portion of the Director's brief. Moorman, on the other hand, maintains the district court's determination is well supported by case law authority and is eminently sound.

3. *Facial Constitutionality—Equal Protection.*

The trial court concluded equal protection concepts were not violated by section 422.33(1)(b), on its face. On its cross appeal, Moorman contends the district court's determination was erroneous as a matter of law. Specifically, it is argued the exclusive use of the sales-factor formula results in a corporation being taxed on an amount of its net income which bears no relation to the corporation's activities in the state nor the benefits received by the corporation from the state. Moorman maintains section 422.33(1)(b) "blatantly discriminates" against corporations whose manufacturing facilities are outside of Iowa in light of the fact those corporations are taxed in the same manner as corporations whose manufacturing facilities are located within the state and thus enjoy the benefits afforded them by the state. The Director counters Moorman's arguments by asserting all corporations similarly situated are treated equally by the Iowa scheme. In addition, the Director claims Moorman did not sustain its burden of demonstrating that no rational basis exists for the classifications established by section 422.33(1)(b).

4. *Constitutionality, As Applied—Due Process.*

The district court concluded Iowa's sales-factor apportionment formula was facially violative of the due process clauses of the Iowa and federal constitutions and was likewise contrary to the commerce clause of the federal constitution. In light of that conclusion the trial court deemed it unnecessary to resolve Moorman's contention section 422.33(1)(b), as applied to Moorman, was contrary to principles of due process. The Director, relying upon the fact the trial court looked to the factual circumstances herein demonstrated by the parties' stipu-

lation thereto, contends the district court actually concluded section 422.33(1)(b) was violative of due process as applied to Moorman rather than on its face.

Consequently, it is urged this issue is the crux of the controversy. The Director claims section 422.33(1)(b) is not violative, as applied, of Moorman's due process rights, relying upon the alleged fact Moorman is not "unique" in conjunction with claimed case law support for the validity of this type of apportionment formula. Moorman, however, maintains the district court appropriately analyzed the facial validity of the sales-factor formula and found it wanting with respect to due process concepts. In the alternative, Moorman argues that should this court conclude section 422.33(1)(b) is facially free from constitutional defect, its application to Moorman amounts to a denial of due process, relying upon the arguments posited in the facial due process portion of its brief and argument.

5. *Constitutionality, As Applied—Commerce Clause.*

Again, in light of its ultimate conclusion, the district court did not feel it necessary to resolve Moorman's contention concerning the constitutionality of section 422.33(1)(b), as applied, with respect to the commerce clause of the federal constitution. If this court determines section 422.33(1)(b) is not facially constitutionally defective, Moorman seeks relief by way of this contention, relying upon alleged case law support and its previously referred to commerce clause argument. The Director, again arguing that commerce clause and due process considerations are substantially identical, relies upon his previously referred to commerce clause and due process arguments and maintains no constitutional violation is present under these circumstances.

6. *Constitutionality, As Applied—Equal Protection.*

This issue was not resolved by the district court for the previously referred to reason. Moorman contends application of section 422.33(1)(b) to it results in a denial of equal protection, citing as support therefor the equal protection argument asserted in its challenge to the facial validity of the subject statute. The Director seeks to rebut those contentions by pointing to department of revenue statistics which demonstrate Moorman was not treated differently from other similarly situated taxpayers. In addition, the Director again points to alleged case law support for the proposition that no specific income apportionment formula is constitutionally required.

7. *Constitutionality, As Applied—Article VIII, Section 12, Iowa Constitution.*

Moorman, on cross appeal, points to department of revenue records demonstrating that one foreign manufacturing corporation was permitted by the Director to apportion its net income according to a formula other than that prescribed by section 422.33(1)(b) and argues such fact constitutes a violation of Article VIII, section 12, of the Iowa Constitution, which prohibits such "exclusive privileges." The Director contends that constitutional provision has no application to administrative as opposed to legislative acts, or, in the alternative, cannot serve as the basis for Moorman's requested relief in the absence of a demonstration of discriminatory taxation with respect to similarly situated corporations. No mention of this issue can be found in the district court's ruling.

8. *In ordering Moorman to comply with section 422.33(1)(b), did the Director contravene the duties and responsibilities imposed upon him by section 422.33 and act arbitrarily and capriciously?*

Moorman contends the Director's denial of Moorman's request for an alternative apportionment formula, pursuant to section 422.33(2), violated the duties imposed upon the Director by said section in light of the fact it was clearly demonstrated the sales-factor formula did not result in the allocation to Iowa of that portion of Moorman's net income which was reasonably attributable to Moorman's Iowa business activities. Moorman argues such refusal was the result of a "total abdication of duty" and was arbitrary and capricious. The Director maintains an alternative formula is only available to a taxpayer if the application of the sales-factor approach results in the very constitutional deficiencies which are allegedly involved herein. In other words, it is the Director's position this issue is meaningless in light of the fact any resolution of the constitutional issues involved herein disposes of Moorman's contention. Consequently, the Director again advances his previous constitutional arguments. This issue was not confronted by the trial court.

9. *Retroactivity or prospectivity of a determination section 422.33(1)(b) suffers constitutional deficiencies.*

Resolution of this issue is complicated by a vague record with respect to procedural aspects connected therewith. At this point, suffice it to say Moorman contends this issue is not before this court since it was not raised below. In the alternative, Moorman argues the scope of any decision herein is controlled by section 422.73, which establishes limitations upon the timeliness of refund requests. The Director, on the other hand, argues this court

must define the scope of any determination invalidating section 422.33(1)(b) and posits guidelines in this regard. The district court held its ruling would apply to Moorman and all similarly situated corporations not foreclosed by the time limitations established by sections 422.28 and 422.73.

I. At the outset, this court employs several well settled principles in dealing with questions of a statute's constitutionality:

It is well settled, with notable exceptions not here involved, that all presumptions are in favor of the constitutionality of a regularly enacted statute.

Where the constitutionality of a statute is merely doubtful, this court will not interfere, as it must be shown that legislative enactments clearly, palpably and without doubt infringe upon constitutional rights before an attack will be upheld.

Moorman, as the attacking party, has the burden to demonstrate beyond a reasonable doubt the act violates the constitutional provisions invoked and to point out with particularity the details of the alleged invalidity. To sustain this burden it must negative every reasonable basis which may support the statute. State v. Kueny, 215 N.W.2d 215, 216-217 (Iowa 1974); Sampson v. City of Cedar Falls, 231 N.W.2d 609, 612 (Iowa 1975); State v. Kramer, 231 N.W.2d 874, 879-880 (Iowa 1975); State v. Aldrich, 231 N.W.2d 890, 894 (Iowa 1975); Avery v. Peterson, 243 N.W.2d 630, 633 (Iowa 1976); City of Waterloo v. Selden, ... N.W.2d ....., ... (Iowa 1977).

Keasling v. Thompson, 217 N.W.2d 687, 690 (Iowa 1974), states this principle:

"The judicial branch of the government has no power to determine whether legislative Acts are wise or unwise, nor has it the power to declare an Act void unless it is plainly and without doubt repugnant to some provision of the Constitution. * * * [citing authority]."

In the field of taxation, it would appear the above principles somewhat understate the deference accorded the legislature. In this regard, see 71 Am.Jur.2d, State and Local Taxation, section 96, page 417 and 84 C.J.S., Taxation, section 7, pages 53-54.

In Butler Brothers v. McColgan, 315 U.S. 501, 507, 62 S.Ct. 701, 704, 86 L.Ed. 991, 996, citing authorities, the Court declared that one who attacks a formula of apportionment of income of a corporation doing business in several states carries the distinct burden of showing by "clear and cogent evidence" that it results in extraterritorial values being taxed by the taxing state.

II. As stated, the trial court held the apportionment provision of the Iowa corporate income tax was facially unconstitutional, in violation of due process clauses of the federal and Iowa Constitutions and commerce clause of the federal constitution.

When a corporation's trade or business is carried on partly within and partly without the state, its tax base generally cannot satisfactorily be identified or segregated on a geographical basis. Due to the impracticability of so identifying or segregating the tax base of such a unitary business resort is made to apportionment formulae as a rough means of attributing a reasonable share of the tax base to the taxing state. These considerations are especially pertinent to the taxation of net income, which is at issue here. The net income or profits of a business frequently are "earned by a series of transactions beginning

with manufacture in [one state] and ending with sales in other states," and "[t]he Legislature, in attempting to put upon this business its share of the burden of taxation, [is] faced with the impossibility of allocating specifically the profits earned by the processes conducted within its borders." Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113, 120-121, 41 S.Ct. 45, 46-47, 65 L.Ed. 165, 169.

In regard to the two previously mentioned computational steps prescribed by section 422.33(1) for ascertaining the Iowa portion of the corporation's net income we point out that the initial step is to assign to Iowa the interest, dividends, rents and royalties received in connection with the business inside Iowa and to assign to non-Iowa sources such income received in connection with business outside the state. All income thus assigned is deducted from the overall federally-based determination of net income that would have been taxable by Iowa if the corporation in question had carried on its entire business within the state.

The income which remains after the first step in the statutory procedure is dealt with in one of two ways. In some cases, which are not of concern here, the remaining income may be specifically allocated within and without the state pursuant to rules and regulations promulgated by the director. In other cases the legislature, recognizing the difficulty of specifically allocating to various jurisdictions the net income remaining after assignment of interest, dividends, etc., provided for apportionment of such income to various jurisdictions by an apportionment formula. Accordingly, when corporations are engaged in the manufacture or sale of tangible personal property partly within and partly without the state where there is ordinarily no satisfactory means of determining the pre-

cise jurisdictional source of net income derived for that activity, the statute provides:

"Where income is derived from the manufacture or sale of tangible personal property, the part thereof attributable to business within the state shall be in that proportion which the gross sales made within the state bear to the total gross sales." Section 422.33(1)(b), The Code.

An apportionment formula, whether a single factor, two factor, or three factor, must be applied against a computed net income. The "net income" of a corporation is defined in section 422.35 to include taxable income properly computed for federal income tax purposes under the Internal Revenue Code of 1954 with certain adjustments, one of which is an equitable deduction for 50 percent of federal income taxes paid during the tax or income year.

The Supreme Court has recognized that such formulae, which owe their very existence to the absence of exact alternatives for dividing the tax base of a unitary business, cannot be expected to achieve precision.

"* * * [T]his Court has long realized the practical impossibility of a state's achieving a perfect apportionment of expansive, complex business activities * * * and has declared that 'rough approximation rather than precision' is sufficient. Illinois Central Ry. v. State of Minnesota, 309 U.S. 157, 161, 60 S.Ct. 419, 422, 84 L.Ed. 670." International Harvester v. Evatt, 329 U.S. 416, 422, 67 S.Ct. 444, 447, 91 L.Ed. 390, 395.

In Nashville, C. & St. L. Ry. v. Browning, 310 U.S. 362, 365-366, 60 S.Ct. 968, 970, 84 L.Ed. 1254, 1256, "* * * the problem to be solved * * * [was] what portion of an interstate organism may appropriately be attributed to each of the various states in which it functions. Basic to the accommodation of these conflicting state and national in-

terests is realization that by its very nature the problem is incapable of precise and arithmetical solution. * * *

"* * * In a matter where exactness is concededly unobtainable and the feel of judgment so important a factor, we must be on guard lest unwittingly we displace the tax officials' judgment with our own."

Hence, it is not necessary that a state demonstrate its use of the single-factor formula has resulted in an exact measure of value. However, when a taxpayer comes forward with strong evidence tending to prove the formula employed will yield a grossly distorted result in its particular case, the state is obliged to counter that evidence to make the accommodation necessary to assure that its taxing power is confined to its constitutional limits. Norfolk & W. Ry. Co. v. Missouri State Tax Com'n, 390 U.S. 317, 329, 88 S.Ct. 995, 1003, 19 L.Ed.2d 1201, 1210.

In Hans Rees' Sons, Inc. v. North Carolina ex rel. Maxwell, 283 U.S. 123, 135, 51 S.Ct. 385, ..., 75 L.Ed. 879, 908, the Court upset the application of a state apportionment formula upon a showing by the taxpayer that the percentage of income attributable to the taxing state was in fact "out of all appropriate proportion to the business transacted" by the taxpayer in the taxing state.

It appears to be well settled that a corporation doing business in several states challenging a formula of apportionment of income has the heavy burden of proving by "clear and cogent evidence" that the apportionment is grossly and flagrantly excessive. In support, see Norfolk & W. Ry. Co. v. State of North Carolina, 297 U.S. 682, 688, 56 S.Ct. 625, 628, 80 L.Ed. 977, 982.

Although, as stated, the trial court's ruling the Iowa single-sales-factor formula was facially unconstitutional in violation of due process is based upon the provisions

of both the federal and Iowa Constitutions, a separate discussion of the two constitutional provisions is not necessary under the general principle that similar constitutional guarantees are usually deemed to be identical in scope, import and purpose. Davenport Water Co. v. Iowa State Commerce Com'n, 190 N.W.2d 583, 593 (Iowa 1971).

Initially, the Director's contention the district court actually concluded section 422.33(1)(b) was violative of due process as applied, rather than on its face, can be disposed of summarily. It is true, as the Director contends, that in reaching its determination the district court refered to the stipulated factual circumstances present herein. However, reference to those facts was for the purpose of explaining the general operation of the statute in order to assess its facial validity. The Director's claim the trial court's analysis was inconsistent with its conclusion is without merit.

In reaching the conclusion section 422.33(1)(b), on its face, contravened principles of due process, the district court made the following analysis:

"In subjecting Moorman's arguments to due process scrutiny the initial inquiry must be whether 'the taxing power exerted by the state bears a relation to protection, opportunities and benefits given by the state. The simple, but controlling question is whether the state has given anything for which it can ask return.' State of Wisconsin v. J. C. Penney Co., 311 U.S. 435, 444 (1940) [61 S.Ct. 246, 250, 85 L.Ed. 267, 270-271, 130 A.L.R. 1229, 1233]. * * *

"Of course, Moorman, first and foremost, is accorded the not invaluable right to do business in the State of Iowa. The record shows its sales in Iowa are substantial. It is given the protection of Iowa laws with resort to the Iowa court system * * *. It is certain that Moorman's business

presence and activities in Iowa with this State's consent constitute the 'minimum connection' by which Iowa can constitutionally levy a corporate tax.

"The more narrow question presented, however, acknowledging that '. . . the tax * * * has relation to opportunities, benefits (and) protection conferred or afforded by (Iowa is whether) the tax is fairly apportioned to the commerce carried on within (this State). Norfolk & Western Railway Co. v. Missouri State Tax Commission, 390 U.S. 317, 325 (1968) (fn 5) [88 S.Ct. 995, 1001, 19 L.Ed.2d 1201].

"Said further by the *Norfolk & Western Railway* Court, * * * '* * * The taxation of property not located in the taxing State is constitutionally invalid, both because it imposes an illegitimate restraint on interstate commerce and because it denies to the taxpayer the process that is his due. A State will not be permitted, under the shelter of an imprecise allocation formula or by ignoring the peculiarities of a given enterprise, to "project the taxing power of the state plainly beyond its borders." (cited cases) Any formula used must bear a rational relationship, both on its face and in its application, to property values connected with the taxing State.'

"* * *

"While accepting the right of Iowa to tax its corporate income for the services, this State renders, it [Moorman] maintains that Iowa cannot tax *all* of Moorman's income, because only a small proportion of servicing inputs arise from its relation with this State. Since the largest quantum of capital and labor respecting its product sold here results from its Illinois relationship, the Iowa apportionment formula fails to reasonably apportion profits traceable to Illinois operations and taxes those

activities occurring in Illinois. In this sense, says Moorman, the single sales factor taxes more than that which should be fairly apportioned to Iowa and, as a consequence, violates its constitutional rights of due process * * *.

"We agree."

In support of its conclusion the district court relied heavily upon statements of the Court in General Motors Corp v. District of Columbia, 380 U.S. 553, 85 S.Ct. 1156, 14 L.Ed.2d 68.

In support of the trial court's ruling Moorman contends the Iowa single-sales-factor formula is facially unconstitutional in violation of due process of law because the formula attempts to tax *all* of the profits arising from sales of tangible personal property in Iowa even though the product is manufactured outside this state; thus, the single-sales-factor formula takes no cognizance of the contribution which the creation of the product outside the state makes to the realization of profit.

Moorman also asserts the Iowa single-sales-factor formula is facially unconstitutional in violation of the commerce clause of the United States Constitution because the formula does not fairly apportion net income to Iowa, causes multiple taxation of corporate net income by two or more states, and provides Iowa corporate businesses with direct commercial advantage not enjoyed by non-Iowa interstate business.

The sum of Moorman's argument is that the Iowa single-sales-factor formula is without economic or legal justification.

The Director, on the other hand, insists the formula provided in section 422.33(1) imposes a tax only on the

portion of net income reasonably attributable to the trade or business within Iowa.

At this point, it should be noted the Director's contention the same "test" is applicable with respect to both a constitutional challenge to the apportionment formula established by section 422.33(1)(b), based upon due process and a similar challenge founded upon the provisions of the commerce clause has some merit. However, while similar considerations are involved in the two constitutional determinations, it would be an overstatement to say they are identical. Notwithstanding some overlap, they will be dealt with separately herein. See Standard Pressed Steel Co. v. Washington Dept. of Rev., 419 U.S. 560, 95 S.Ct. 706, 42 L.Ed.2d 719.

In support of the contention the district court erroneously concluded section 422.33(1)(b) facially contravened due process guarantees, the Director asserts that the United States Supreme Court has never so held, and in fact, has consistently upheld single-factor apportionment formulae. He maintains the taxpayers in those cases which upheld single-factor formulae posited constitutional arguments identical to those asserted by Moorman to no avail, notwithstanding the fact that the tax schemes involved therein were much more harsh than Iowa's corporate tax scheme. Consequently, the Director maintains Moorman's allegations and the district court's determination are untenable.

In State of Wisconsin v. J. C. Penney Co., supra, 311 U.S. at 444, 61 S.Ct. at 249-250, 85 L.Ed. at ....., 130 A.L.R. at 1232-1233, is the following:

"The Constitution is not a formulary. It does not demand of states strict observance of rigid categories nor precision of technical phrasing in their exercise of the most

basic power of government, that of taxation. For constitutional purposes the decisive issue turns on the operating incidence of a challenged tax. A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society."

The Director relies heavily upon the sentiments expressed in the above opinion and upon a number of cases of the Supreme Court which approve single-factor apportionment formulae. See Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113, 41 S.Ct. 45, 65 L.Ed. 165; Bass, Ratcliff & Gretton v. State Tax Commission, 266 U.S. 271, 45 S.Ct. 82, 69 L.Ed. 282; National Leather Co. v. Massachusetts, 277 U.S. 413, 48 S.Ct. 534, 72 L.Ed. 935; Ford Motor Co. v. Beauchamp, 308 U.S. 331, 60 S.Ct. 273, 84 L.Ed. 304; Kent-Coffey Manufacturing Company v. Maxwell, 204 N.C. 365, 168 S.E. 397, 90 A.L.R. 476, aff'd., 291 U.S. 642, 54 S.Ct. 437, 78 L.Ed. 1040. It cannot be denied these cases are in fact supportive of the Director's contentions.

The Court has emphasized two points in evaluating the contention under the due process clause that an apportionment formula attributes more property or income to a taxing state than it may rightly claim. First, the Court has recognized that the very nature of the undertaking—the resort to a mathematical formula to determine the state's share of a business entity's tax base where there is no satisfactory way of determining it directly—involves rough approximation; and the Court has repeatedly held that the due process clause requires nothing more exacting. Second, the Court has made it plain that a taxpayer challenging an apportionment formula has more than the usual

heavy burden of proving by clear and convincing evidence that the application to it of the formula produces a grossly disproportionate result. Another basic principle which has emerged from the opinions of the Supreme Court recognizes that states are given the utmost leeway both in their choice and application of formulae for apportioning the net income of a corporation whose trade or business is carried on partly within and partly without its borders as long as basic considerations of due process and equal protection are observed.

The foregoing statements constitute a fair summary of the decisions of the Court in the cited cases.

With these principles in mind it is argued that in order to sustain the trial court's holding the apportionment formula prescribed in section 422.33(1) is "facially unconstitutional" this court would be required to conclude such a formula by its very terms will necessarily produce a "grossly distorted result" or an apportionment "out of all proportion to the business transacted."

We examine this contention in light of General Motors Corp. v. District of Columbia, 380 U.S. 553, 85 S.Ct. 1156, 14 L.Ed.2d 68, which was relied upon by the trial court in reaching its conclusion and by Moorman in its effort to support the trial court's ruling.

In the cited case the Court was faced with constitutional and statutory challenges to the method of apportionment utilized to determine tax liability under a franchise tax exacted by the District of Columbia. The statute in question provided for taxation on that portion of a corporation's net income which was "fairly attributable" to its activities within the District and authorized the tax commissioner to prescribe regulations concerning the appropriate apportionment formula to be used. General Motors

challenged the sales-factor formula on the ground it attributed to the District an unreasonably high proportion of its total income, and consequently, was contrary to the provisions of the enabling statute and violative of the due process and commerce clauses of the federal constitution.

The Court determined the sales-factor formula was contrary to the statute which authorized the collection of said tax and thus reversed the lower court "without reaching the constitutional questions raised." 380 U.S. at 555, 85 S.Ct. at 1158, 14 L.Ed.2d at ____.

We quote from the opinion:

"The conclusion which we reach by analysis of the plain language of the statute also finds support in the consequences which a contrary view would have for the overall pattern of taxation of income derived from interstate commerce. The great majority of States imposing corporate income taxes apportion the total income of a corporation by application of a three-factor formula which gives equal weight to the geographical distribution of plant, payroll, and sales. The use of an apportionment formula based wholly on the sales factor, in the context of general use of the three-factor approach, will ordinarily result in multiple taxation of corporate net income; for the States in which the property and payroll of the corporation are located will allocate to themselves 67% of the corporation's income, whereas the jurisdictions in which the sales are made will allocate 100% of the income to themselves. Conversely, in some cases enterprises will have their payroll and plant located in the sales-factor jurisdictions and make their sales in the three-factor jurisdictions so that only 33% of their incomes will be subject to state taxation. * * *

"Moreover, the result reached in this case is consistent with the concern which the Court has shown that state taxes imposed on income from interstate commerce be fairly apportioned. In upholding taxes imposed on corporate income by Connecticut and New York and apportioned in accordance with the geographical distribution of a corporation's property, this Court carefully inquired into the reasonableness of the apportionment formulae used.

" 'The profits of the corporation were largely earned by a series of transactions beginning with manufacture in Connecticut and ending with sale in other states. In this it was typical of a large part of the manufacturing business conducted in the state. The Legislature, in attempting to put upon this business its fair share of the burden of taxation, was faced with the impossibility of allocating specifically the profits earned by the processes conducted within its borders. * * * There is * * * nothing in this record to show that the method of apportionment adopted by the state was inherently arbitrary, or that its application to this corporation produced an unreasonable result.' Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113, 120-121, 41 S.Ct. 45, 47, 65 L.Ed. 165. See also Bass, Ratcliff & Gretton, Ltd. v. State Tax Comm'n, * * * [supra]. While the Court has refrained from attempting to define any single appropriate method of apportionment, it has sought to ensure that the methods used display a modicum of reasonable relation to corporate activities within the State. The Court has approved formulae based on the geographical distribution of corporate property and those based on the standard three-factor formula. * * * [citing authorities]. The standard three-factor formula can be justified as a rough, practical approximation of the distribution of either a corporation's sources of income or the social costs which it generates. By contrast, the geogra-

phical distribution of a corporation's sales is, by itself, of dubious significance in indicating the locus of either factor. We of course do not mean to take any position on the constitutionality of a state income tax based on the sales factor alone. For the present purpose, it is sufficient to note that the factors alluded to by this Court in justifying apportionment measures constitutionally challenged in the past lend little support to the use of an exclusively sales oriented approach. In construing the District Code to prohibit the use of a sales-factor formula, we sacrifice none of the values which our scrutiny of state apportionment measures has sought to protect." 380 U.S. at 559-561, 85 S.Ct. at 1160-1161, 14 L.Ed.2d at .....

Although the Court in *General Motors* by way of dictum criticized the single-sales-factor apportionment formula it "refrained from attempting to define any single appropriate method of apportionment," and explicitly pointed out that its decision was not based on constitutional grounds when it said, "We of course do not mean to take any position on the constitutionality of a state's income tax based on the sales factor alone."

We have recognized the principle that courts have a duty to avoid constitutional questions when merits of a case may be fairly decided without facing such questions.

In Collier v. Denato, 247 N.W.2d 236, 241 (Iowa 1976), we quoted with approval this statement from State v. Thomas, 219 N.W.2d 3, 4 (Iowa 1974):

"* * * We prefer to decide cases on nonconstitutional grounds when possible. City of Des Moines v. Lohner, 168 N.W.2d 779, 782 (Iowa) ('We do not consider constitutional questions unless it is necessary for the disposition of the case.'); 16 Am.Jur.2d Constitutional Law § 113 at 301; 16 C.J.S. Constitutional Law § 94 at 317 ('The principle that

necessity of determination is a condition to judicial consideration of constitutional questions also finds application in the rule that such questons will not be passed on where the issues involved in the particular case may be decided on another ground, even though the constitutional issue has been properly presented.') * * *."

The same principle is announced in Alma Motor Co. v. Timken-Detroit Axle Co., 329 U.S. 129, 136, 67 S.Ct. 231, 234, 91 L.Ed. 128, 133 and authorities cited in footnote 8. See also Kovacs v. Brewer, 356 U.S. 604, 607, 78 S.Ct. 963, 966, 2 L.Ed.2d 1008, ...

Nevertheless, where the Court has employed the principle of avoidance of constitutional issues language used in such a decision does not afford a satisfactory basis for determining a state statute unconstitutional on its face. This is particularly true in light of the well-settled principles set out in division I hereof which this court adheres to in dealing with questions of a statute's constitutionality.

As noted, the burden is on the attacking taxpayer to demonstrate beyond a reasonable doubt that the act challenged here is unconstitutional on its face. There is nothing inconsistent with this principle and that announced in Butler Brothers v. McColgan, 315 U.S. at 507, 62 S.Ct. at 704, 86 L.Ed. at 996, that one who attacks a formula of apportionment of income of a corporation doing business in several states carries the distinct burden of showing by "clear and cogent evidence" that it results in extra-territorial values being taxed by the taxing state. The phrase "beyond a reasonable doubt" refers to the quantum of evidence necessary to sustain the attacking party's challenge on constitutional grounds, whereas the phrase "clear and cogent evidence" refers to the quality of evidence which must be offered by such party in an effort to sustain his burden of proof as to application of the formula issue.

There is another reason why we feel the *General Motors* decision is not determinative of the question considered in this division. As counsel points out, the statutory language on which decision turned in *General Motors* was not the provision making "net income * * * as is fairly attributable" to the District taxable; rather it was the specific requirement that net income derived from a trade or business carried on within and without the District shall "be deemed to be income from sources within and without the District." It was the Court's interpretation of this statutory phrase—which has no analogue in the Iowa statute and can scarcely be found in the due process clause—which was the fulcrum of the Court decision.

A search of the citator discloses General Motors Corp. v. District of Columbia has been cited in State Loan and Finance Corp. v. District of Columbia, 381 F.2d 895, 902 (D.C. Cir. 1967), on a proposition not involved here. We are unaware of any decision, federal or state, where it has been cited on the issue before us.

As noted, in its opinions in this area the Supreme Court has recognized: (1) the practical impossibility of a state's achieving a perfect apportionment of expansive, complex business activities such as the unitary business under consideration here; (2) rough approximation rather than mathematical precision is sufficient; (3) the heavy burden cast upon the taxpayer in challenging a legislative enactment on constitutional grounds; and (4) the utmost leeway must be given the states both in their choice and application of formulae in this connection as long as basic considerations of due process and equal protection are observed.

In light of those principles we conclude section 422.33(1) calls for a method of allocation which is fairly calculated to assign to Iowa only that portion of the taxpayer's net income reasonably attributable to the trade or business done in Iowa since the taxing power exerted by this statute bears fiscal relation to the protection, opportunities and benefits given by the state. See Complete Auto Transit, Inc. v. Brady, ____ U.S. ____, 97 S.Ct. 1076, 1083, ____ L.Ed.2d ____. It is settled law that a state which provides an orderly market in which to transact business confers benefits which constitutionally justify the levy of an income tax. State of Wisconsin v. J. C. Penney Co., 311 U.S. 435, 61 S.Ct. 246, 85 L.Ed. 267.

It cannot logically be maintained that the apportionment formula prescribed by section 422.33(1) with the adjustments provided for in section 422.35 will necessarily produce a "grossly distorted result" or an apportionment "out of all proportion to the business transacted" in every conceivable situation which might possibly arise.

Thus far we have referred to only one of the fiscal years in issue—1968—in stating the percentage produced by application of the single-factor formula—22.617. The summary of exhibits 15 and 16 in Moorman's brief and argument shows application of this formula produced a percentage of 21.21 for 1969, 19.95 for 1970, 18.95 for 1971, and 18.67 for 1972.

Moorman points out employment of the three-factor formula would have resulted in a lower percentage for use in computing its income from sale of tangible personal property attributable to Iowa in those years.

However, the mere fact application of the single-factor formula results in a larger percentage being used for ascertaining the Iowa portion of the corporation's net income than would application of some other type of formula does not render the apportionment provision of the Iowa corporate income tax law facially unconstitutional

in violation of due process clauses of the federal and state constitutions. Such evidence alone does not establish that the difference between the two figures represents either double taxation or a taxation of extraterritorial values. Fairness is not equated with absolute precision.

In our opinion the formula in question meets the due process requirement of attempting to fairly allocate the corporation's income. In support of this conclusion see General Motors Corporation v. State, 181 Colo. at ____, 509 P.2d at 1266, and authorities cited.

The statute is free from the constitutional infirmities asserted and considered in this division. The trial court erred in holding otherwise.

III. The district court determined section 422.33(1)(b), on its face, contravened the principles embodied in the commerce clause of the federal constitution. The Director maintains such determination is erroneous as a matter of law.

The Director, perhaps overstating the similarity between the two constitutional analyses, does not distinguish between his due process and commerce clause contentions. The authorities and arguments posited in support of the former are likewise offered as supportive of the latter.

The considerations applicable to the resolution of a due process challenge to an apportionment formula are substantially similar to those utilized in assessing the validity of that formula with respect to the commerce clause. Extraterritorial taxation is constitutionally defective "both because it imposes an illegitimate restraint on interstate commerce and because it denies to the taxpayer the process that is his due." Norfolk & W. Ry. Co. v. Missouri State Tax Com'n, supra, 390 U.S. at 325, 88 S.Ct. at 1001, 19 L. Ed.2d at ____.

The commerce clause prohibits a state from exacting a tax from an interstate corporation which is determined through application of inappropriate apportionment formulae, and consequently, subjects interstate commerce to the risk of multiple taxation. J. D. Adams Mfg. Co. v. Storen, 304 U.S. 307, 311-312, 58 S.Ct. 913, 916, 82 L.Ed. 1365; Gwin, White & Prince v. Henneford, 305 U.S. 434, 438-440, 59 S.Ct. 325, 327-328, 83 L.Ed. 272; Central Railroad Co. v. Commonwealth of Pa., 370 U.S. 607, 612, 82 S.Ct. 1297, 1301, 8 L.Ed.2d 720; Standard Pressed Steel Co. v. Washington Dept. of Rev., supra, 419 U.S. at 563-564, 95 S.Ct. at 709, 42 L.Ed.2d at ____. As a result of said multiple taxation, interstate commerce is put at a commercial disadvantage with respect to its local counterpart.

Moorman, relying upon the first paragraph of that portion of the General Motors Corp. v. District of Columbia opinion set out in division II, contends the apportionment formula prescribed by section 422.33(1)(b) results in multiple taxation of interstate commerce and a consequent, illegitimate benefit to Iowa manufacturers. Specifically, it maintains the sales-factor apportionment formula, on its face, subjects corporations manufacturing goods outside of Iowa and selling goods within this state to a tax on all income from their Iowa sales while the manufacturing states are also entitled to tax a portion of such income. In other words, Moorman assails the facial validity of 422.33(1)(b) on the ground it results in the taxation of more than 100% of a corporation's income from its Iowa sales. In addition, Moorman points out Iowa manufacturing corporations are not subject to such multiple taxation, and consequently, are the recipients of a statutorily based illegitimate commercial advantage.

Much of the analysis advanced in the previous division is of assistance in the resolution of Moorman's com-

merce clause contentions. Again, Moorman must satisfy the heavy burden of demonstrating that section 422.33(1)(b) violates the constitutional precept invoked. Furthermore, the weighty presumption of constitutionality is again operative.

Moorman's contention a foreign manufacturing corporation selling its products in Iowa is subject to tax on 100% of its income from Iowa sales ignores the provisions and application of section 422.35. That statutory provision provides for the adjustments necessary to arrive at a corporation's net income for Iowa tax purposes. A number of potentially large deductions are provided for therein, including the previously mentioned deduction of 50% of the federal tax liability incurred. Clearly, a corporation in Moorman's situation is not taxed by Iowa on 100% of its income from Iowa sales. Consequently, Moorman has not demonstrated that the provisions of section 422.33(1)(b) result in a foreign corporation being taxed on more than 100% of its income from Iowa sales.

We rely again on the principles recognized by the Supreme Court in its opinions in this area as summarized in division II in concluding use of the single-sales-factor formula provided by the statute does not violate the commerce clause of the United States Constitution. The trial court erred in holding otherwise.

IV. On its cross appeal, Moorman maintains the district court erred as a matter of law in concluding section 422.33(1)(b), on its face, did not violate the guarantees of equal protection provided in the federal and state constitutions.

The district court ruled as follows with respect to Moorman's equal protection contentions:

"It is readily apparent that the statute in question focuses on the classification of 'corporations.' Since classifying corporations for different tax treatment than individual persons has most recently been sustained in Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973) [93 S.Ct. 1001, 35 L.Ed.2d 351], the Iowa scheme taxing corporations cannot be challenged merely because corporations are taxed. Nor does the fact that Section 422.33 establishes a graduated tax on corporate incomes lead to a finding of an invidious classification, for all corporations, without regard to any other factors, have been taxed by the same apportionment mechanism—the single sales factor. * * * [citing authority]. The simple matter is that for purposes of classification, the legislature has singled out the income for all 'corporations' as the basis on which the single sales factor is to apply; and while application of the formula yields differing amounts of tax due, for equal protection analysis, all corporations are similarly situated and are accorded exactly the same tax statement.

"This Court concludes that Iowa Code Section 422.33 on its face creates no classifications which may be found to violate Moorman's rights to equal protection of the law * * *. Indeed, Moorman's complaints concerning the operation of Section 422.33 would seem to be complaints shared by all corporations taxed by the statute whose operations are multi-state * * *."

Although Moorman argues section 422.33(1)(b) is facially invalid, its brief on cross appeal contains the following:

*"On its face, it would appear * * * section 422.33(1) does operate uniformly* upon all corporations engaged in the manufacture or sale of tangible personal property in the State of Iowa * * *.

"In fact, however, it is readily apparent that *the statute does not have a uniform operation.* * * *." (Emphasis deleted and supplied).

The quoted statements from Moorman's brief and the tenor of its contentions clearly demonstrate Moorman is in fact challenging the *application* of section 422.33(1)(b) to the particular circumstances herein. The authorities cited and arguments asserted will therefore be considered when Moorman's equal protection challenge to the sales-factor formula as applied to Moorman is considered in the next division.

In any event, even if Moorman is in fact attempting to challenge the facial validity of section 422.33(1)(b) with respect to equal protection guarantees, the contention is without merit. See City of New Orleans v. Dukes, ... U.S. ....., ..., 96 S.Ct. 2513, 2518, ... L.Ed.2d ....., ...

In Dickinson v. Porter, 240 Iowa 393, 400-401, 35 N.W. 2d 66, 72, are the following pertinent comments:

"If there is any reasonable ground for the classifications in this law and it operates equally upon all within the same class, there is uniformity in the constitutional sense and no violation of any constitutional provision invoked by plaintiff. * * * [citing authorities].

"The statute amounts to a legislative finding there are sufficient differences between property to which the act applies and other property to justify the classification. We will not interfere unless plaintiff has proven the classification does not rest on a reasonable basis but is essentially arbitrary and palpably discriminating. * * * [citing authority].

"It is well recognized the legislature has a wide discretion in determining classifications to which its acts shall

apply. * * * [citing authority]. In tax matters even more than in other fields, legislatures possess the greatest freedom in classification. * * * [citing authorities].

"It is not sufficient that the court may regard the reason for the classification a poor one. * * * [citing authorities]. The differences upon which the classification is based need not be great or conspicuous. * * * [citing authorities].

" 'An iron rule of equal taxation' is neither attainable nor necessary. * * * [citing authorities]."

Moorman's only attempt to demonstrate the unreasonableness of the classification contained in section 422.33(1)(b) is with reference to admittedly "extreme" hypothetical situations. Such a tactic clearly does not establish the classification is unreasonable. To the extent Moorman's position is that its situation comes within one of the hypotheticals posited, the contention more appropriately deals with the validity of the statute as applied and will be considered hereinafter.

Moorman's contention section 422.33(1)(b), on its face, violates equal protection guarantees is without merit.

V. As pointed out, in view of its ultimate conclusion, the district court did not feel compelled to resolve issues presented by Moorman's contentions other than those concerning the facial constitutionality of section 422.33(1)(b).

However, since this court has determined that the single-sales-factor formula is not facially defective, Moorman's contention section 422.33(1)(b) is constitutionally deficient as applied to Moorman with respect to the due process, equal protection and commerce clauses must be dealt with.

Moorman maintains the constitutional arguments advanced for invalidating that portion of the statute on its face are equally pertinent to its claim for overturning on constitutional grounds the application of the Iowa single-sales-factor formula to its net income. Hence, it reasserts by reference the arguments previously posited in support of the facial attacks on this statute, relying again most heavily upon General Motors Corp. v. District of Columbia, supra.

This court has determined section 422.33(1)(b), on its face, is free from constitutional defect. From that determination it follows said statutory provision may generally be applied to corporate entities subject thereto without constitutional transgression. However, a statute may be constitutional with respect to some factual situations but constitutionally infirm with respect to others. Williams v. Illinois, 399 U.S. 235, 242, 90 S.Ct. 2018, 2023, 26 L.Ed.2d 586; Walker v. Johnson County, 209 N.W.2d 137, 140 (Iowa 1973); A. B. C. Distrib. Co., Inc. v. City & Cty. of San Francisco, 15 Cal.3d 566, 125 Cal. Rptr. 465, 542 P.2d 625, 628-629; 16 Am.Jur.2d, Constitutional Law, section 194; 16 C.J.S., Constitutional Law, section 71, pages 217-218.

At this point the following statement from State v. Richardson, 285 A.2d 842, 846 (Me. 1972), is apposite:

"* * * One who seeks to assert a particular conglomerate of circumstances in which the operation of the statute might be unconstitutional must prove such facts in an actual case to test the constitutionality of the statute, as applied, rather than to seek to invalidate it on its face by hypothesizing marginal situations in which the statute might be conceived to operate with unduly oppressive or unjustifiably arbitrary impact indicative of unconstitutionality. * * * [citing authority]."

Moorman as the challenging party has the burden to demonstrate that section 422.33(1)(b), already found to be generally constitutionally valid, violates the constitutional precepts invoked when applied to it because of special factual circumstances surrounding Moorman's claim for relief.

Under the record, Moorman has not carried its burden, since it has not demonstrated by the stipulated facts the Iowa single-sales-factor-apportionment formula constitutes an unreasonable and arbitrary application in Moorman's particular case. No unusual or special factual circumstances inherent in Moorman's corporate operations are shown to exist. All that is established by the record is that Moorman apparently functions in a manner not dissimilar from the typical unitary business organization. No evidentiary justification is provided for a conclusion Moorman is somehow different from those corporations legitimately subject to the provisions of section 422.33(1)(b). In the absence of such evidence Moorman has not made out a sufficient case for overturning on constitutional grounds the application of the Iowa single-sales-factor formula to its net income.

VI. Article VIII, section 12, of the Iowa Constitution is applicable to corporations and provides as follows:

"Subject to the provisions of this article, the General Assembly shall have power to amend or repeal all laws for the organization or creation of corporations, or granting of special or exclusive privileges or immunities, by a vote of two-thirds of each branch of the General Assembly; and *no exclusive privileges, except as in this article provided, shall ever be granted.*" (Emphasis supplied).

Moorman directs this court's attention to the parties' stipulation which demonstrates that one foreign manufac-

turing corporation was permitted to use an alternative apportionment formula during the years in question. This approval by the Director of a formula other than the sales-factor formula prescribed in section 422.33(1)(b), allegedly amounts to the unauthorized grant of an exclusive privilege in violation of the above constitutional provision.

Moorman's contention is without merit. It is clear from the language of the constitutional provision in question that it applies to legislative enactments. Consequently, it has no application to alleged improprieties on the part of the Director. However, this should not be understood as assigning unfettered discretion to the Director. The general principles embodied in the constitutional provision are well covered by various other constitutional guarantees which are applicable to the Director's conduct.

VII. Moorman's next contention focuses upon the Director's failure to permit Moorman to utilize an alternative apportionment formula. It is argued the Director's rejection of Moorman's request was arbitrary and capricious and contrary to the provisions of section 422.33(2) which provides:

"If any taxpayer believes that the method of allocation and apportionment hereinbefore prescribed, as administered by the director and applied to his business, has operated or will so operate as to subject him to taxation on a greater portion of his net income than is reasonably attributable to business or sources within the state, he shall be entitled to file with the director a statement of his objections and of such alternative method of allocation and apportionment as he believes to be proper under the circumstances * * *; and if the director shall conclude that the method of allocation and apportionment theretofore employed is in fact inapplicable and inequi-

table, the director shall redetermine the taxable income by such other method * * * as seems best calculated to assign to the state for taxation the portion of the income reasonably attributable to business and sources within the state, not exceeding, however, the amount which would be arrived at by application of the statutory rules for apportionment."

The tenor of Moorman's argument concerning the Director's allegedly arbitrary and capricious conduct makes it impossible to separate this issue from the previous issues concerning the constitutionality of section 422.33(1)(b). Moorman's argument herein is based upon the constitutional invalidity of the sales-factor apportionment formula and, once again, relies almost exclusively upon General Motors Corp. v. District of Columbia, supra.

By reason of the determinations made in the previous divisions of this opinion we conclude Moorman's contention considered in this division is without merit.

The decisions reached in divisions II, III and IV of this opinion require a reversal upon the Director's appeal. By reason of the determinations reached in divisions V, VI and VII the matter is affirmed on Moorman's cross appeal.

All Justices concur except McCormick, J., who concurs specially.

McCORMICK, J. (concurring specially).

The United States Supreme Court has not yet decided the constitutionality of a corporate income tax formula which apportions net income of a unitary corporation based solely on the geographical distribution of sales. Although the Court has said "the geographic distribution of a corporation's sales is, by itself, of dubious significance in

indicating the locus [of either a corporation's sources of income or the social costs which it generates]," it has expressly refrained from taking "any position on the constitutionality of a state income tax based on the sales factor alone." However, the Court has noted "the factors alluded to by this Court in justifying apportionment measures challenged in the past lend little support to the use of an exclusively sales-oriented approach." General Motors Corporation v. District of Columbia, 380 U.S. 553, 561, 85 S.Ct. 1156, 1161, 14 L.Ed.2d 68, 73-74 (1965). In view of these statements by the Supreme Court in its most recent case touching on the subject, it seems reasonable to conclude that the constitutionality of Iowa's apportionment formula is open to question.

Moreover, I do not believe the *General Motors* case is wholly distinguishable on the basis suggested by the majority. Nevertheless, I agree with the majority that the case is not dispositive of the constitutional issues we face in this case. Further, under existing precedent of the Supreme Court and this court, I agree that Moorman did not establish the unconstitutionality of the Iowa apportionment formula either on its face or as applied here under the state due process clause and the federal due process and commerce clauses. Finally, I do not agree with the Director's view of his duty under Code § 422.33(2) but do not believe he breached his duty under the present record.

I. The problem addressed by the Court in *General Motors* was one of statutory interpretation. Hence the case did not involve principles of constitutional adjudication which implicate not only the heavy burden which must be met in demonstrating invalidity of a statute but also the distinction between invalidity of a statute on its face and as applied. See United States v. Raines, 362 U.S. 17,

80 S.Ct. 519, 4 L.Ed.2d 524 (1960). A statute is not unconstitutional on its face unless it is unconstitutional in every conceivable state of facts; it is ordinarily not unconstitutional as applied unless it is unconstitutional as applied in the specific factual situation before the court. The significance of this distinction is reflected in the position of the dissenters in *General Motors* in the court of appeals. They did not dispute the constitutionality of the single-factor formula on its face. See District of Columbia v. General Motors Corporation, 336 F.2d 885, 902-904 (D.C. Cir. 1964); see also Smoot Sand and Gravel Corp. v. District of Columbia, 261 F.2d 758, 763 (D.C. Cir. 1958) (" 'And the gross receipts formula has been in operation too long and upheld in the courts too frequently to be attacked as unfair or unreasonable *per se* or in the abstract.' "). To be unconstitutional on its face the formula would have to be unconstitutional all of the time, not just some of the time.

In *General Motors*, the Supreme Court based its decision on resolution of the issue whether the district tax commissioners acted within their statutory authority when they adopted a single-factor sales formula to determine the portion of corporate net income subject to the franchise tax. Two statutory directives existed. One required that the tax be on the portion of net income " 'fairly attributable to any trade or business carried on or engaged in within the District * * *.' " The other provided that the net income derived from the trade or business of any corporation " 'carried on or engaged in both within and without the District * * * be deemed to be income from sources within and without the District.' " *General Motors*, supra, 380 U.S. at 554-555, 85 S.Ct. at 1157, 14 L.Ed.2d at 70. In holding that the single-factor formula was inconsistent with these statutory directives, the Court relied on the fact that the formula would not apportion income to

non-sales income-producing activities outside the District. By statutory mandate, net income from District sales had to be considered the product in part of outside sources. Yet the sales factor formula would not apportion any income outside the District if all sales were made in the District, even though manufacturing occurred elsewhere.

I do not believe the existence of the second statutory requirement wholly distinguishes *General Motors* from the present case on the theory this directive is not part of the constitutional standard. Of course, the first statutory requirement is identical to the constitutional mandate under the due process and commerce clauses that a tax be fairly apportioned to commerce carried on within the taxing jurisdiction. See Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 79 S.Ct. 357, 3 L.Ed.2d 421 (1959); Annot., 34 L.Ed.2d 749, 765. I believe the second requirement is part of the constitutional standard when non-sales income-producing activities do occur outside the taxing jurisdiction. For example, when manufacturing activity occurs outside the jurisdiction, I believe profit realized upon sale of the manufactured goods in the taxing jurisdiction must be deemed to arise from that activity as well as from the sale. This is as basic as the principle of contradictions. A stick cannot have only one end. Similarly, income cannot be isolated from the capital or labor, or both, which produce the product or service which is sold. This is a matter of self-evident fact rather than a matter of "economic theory" as suggested by the Director in this case.

This fact has been consistently recognized by the Supreme Court. See Stratton's Independence v. Howbert, 231 U.S. 399, 34 S.Ct. 136, 58 L.Ed. 285 (1913). It is basic to the apportionment formula cases. In Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113, 120, 41 S.Ct. 45, 47,

65 L.Ed. 165, 169 (1920), the Court observed, "The profits of the corporation were largely earned by a series of transactions *beginning with manufacture in Connecticut and ending with sale in other States.* (emphasis added). The challenge to the apportionment formula failed in *Underwood* because the taxpayer failed to demonstrate the apportionment formula, based on the geographical situs of real and tangible personal property, reached more than the profits actually earned by the income-producing activities in the taxing state. A different result occurred in Hans Rees' Sons, Inc. v. North Carolina ex rel. Maxwell, 283 U.S. 123, 51 S.Ct. 385, 75 L.Ed. 879 (1931), precisely because the taxpayer did meet that burden. ("[T]he statutory method, as applied to the appellant's business for the years in question, operated unreasonably and arbitrarily in attributing to North Carolina a percentage of income out of all appropriate proportion to the business transacted by the appellant in that state.") 283 U.S. at 135, 51 S.Ct. at 389, 75 L.Ed. at 908. The constitutional standard is premised on the theory that each transaction from manufacture through sale contributes to the income which is realized, but it puts the heavy burden on the taxpayer to demonstrate what share of his income from a unitary corporation is attributable to activities in the taxing jurisdiction, and further, that the apportionment formula produces a grossly distorted result in those circumstances. *Id.*, 283 U.S. at 133, 51 S.Ct. at 389, 75 L.Ed. at 905 ("The difficulty of making an exact apportionment is apparent and hence, when the state has adopted a method not intrinsically arbitrary, it will be sustained until proof is offered of an unreasonable and arbitrary application in particular cases.").

Any single-factor formula is thus capable of producing a grossly distorted result because it focuses artificially on only one component of the corporation's income-produc-

ing activities. See, e.g., Norfolk and Western Railway Company v. Missouri State Tax Commission, 390 U.S. 317, 88 S.Ct. 995, 19 L.Ed.2d 1201 (1968). Less danger exists that a multiple-factor formula will have that result because it recognizes additional relevant components.

I believe the Supreme Court struck the single-factor sales formula in *General Motors* because it read the governing statute as requiring adoption by the commissioners of an apportionment formula which would never deny recognition to non-sales income-producing activities which occurred outside the District. The case is distinguishable from the present one because the constitutional standard does not demand as much. Instead, it prohibits use of an apportionment formula which, in a given case, grossly overstates the portion of net income attributable to income-producing activities in the taxing jurisdiction. While this standard makes a single-factor sales formula more susceptible to successful attack in a particular application—for example when all sales occur in the taxing jurisdiction and all manufacturing occurs in another jurisdiction—it does not make a single-factor sales formula unconstitutional in every conceivable circumstance nor does it relieve the taxpayer of his burden to prove unconstitutionality of its application.

In the present case, Moorman did not attempt to prove the amount of its actual net income from Iowa activities in the years involved. Therefore no basis was presented for comparison of the corporation's Iowa income and the income apportioned to Iowa under the formula. In this era of sophisticated accounting techniques, it should not be impossible for a unitary corporation to prove its actual income from activities in a particular state. However, Moorman showed only that its tax liability would be substantially less if Iowa employed a three-factor apportionment formula. We have no basis to assume that the three-factor formula produced a result equivalent to the corporation's actual income from Iowa activities. Having failed to establish a basis for comparison of its actual income in Iowa with the income apportioned to Iowa under the single-factor formula, Moorman did not demonstrate that the single-factor formula produced a grossly unfair result. Thus it did not prove unconstitutionality of the formula as applied.

II. We are not limited in our interpretation of the due process clause of Ia. Const. Art. I § 9 by interpretations of the same language in U.S. Const. Amend. 14 by the Supreme Court. Deference to federalism has led the Supreme Court to accord states wide latitude in economic matters. See New Orleans v. Dukes, 427 U.S. 297, 303, 96 S.Ct. 2513, 2516-2517, 49 L.Ed.2d 511, 516-517 (1976). This factor does not inhibit state courts applying similar state constitutional provisions. In addition, we have the independent right to say what our state constitution means. See Brennan, *State Constitutions and the Protection of Individual Rights,* 90 Harv. L. Rev. 489 (1977). However, the distinction makes no practical difference in the present case because we have accorded equivalent latitude to the legislature in tax matters under our state constitution. See City of Waterloo v. Selden, 251 N.W.2d 506 (Iowa 1977).

III. I do not believe Moorman's attack on the single-factor apportionment formula is answered by the Director's reliance on the frequent statement of the Supreme Court that, because of the practical impossibility of a state's achieving perfect apportionment, a "rough approximation" is sufficient. See International Harvester Co. v. Evatt, 329 U.S. 416, 67 S.Ct. 444, 447, 91 L.Ed. 390, 395 (1947). This rule does not excuse a state from trying to achieve

fairness, nor does it excuse a state from using a different formula in situations where it is demonstrated that an existing formula grossly overreaches.

IV. Similarly, I do not agree with the Director that his power to grant relief under Code § 422.33(2) is limited to situations where application of the sales factor formula would be unconstitutional. I do not understand that the majority opinion approves this interpretation, but does not pass on it. I would disapprove it. The statute does not purport to impose upon the taxpayer a burden of proving unconstitutionality in order to obtain relief from the formula. Instead, he is merely required to file a statement of his objections and set forth "such alternative method of allocation and apportionment as he believes to be proper under the circumstances * * *." In turn, the Director is not precluded from affording relief except when the taxpayer proves a grossly distorted result will ensue from use of the sales formula. Rather he is empowered to grant relief when he finds the statutory formula "inapplicable and inequitable." The statute vests the Director with reasonable administrative discretion and manifests a legislative intention that it be exercised. No issue is presented in this case regarding the constitutionality of this delegation of power.

I do not believe Moorman was prejudiced by the Director's refusal to exercise this discretion in the present case because the record does not show Moorman made an adequate case for its exercise.

I concur in the result.

IN THE SUPREME COURT OF IOWA

No. 2-60220

MOORMAN MANUFACTURING COMPANY,
Plaintiff-Appellee,

vs.

G. D. BAIR, DIRECTOR OF REVENUE,
STATE OF IOWA,
Defendant-Appellant.

ORDER

(Filed June 27, 1977)

Plaintiff-Appellee's petition for rehearing in the above entitled matter has been duly considered by the entire membership of the court and is now refused and denied.

Done this 27th day of June, 1977.

/s/ C. Edwin Moore
Chief Justice—Iowa Supreme Court

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Harry Griger
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APPENDIX D

IN THE SUPREME COURT OF IOWA

No. 2-60220

MOORMAN MANUFACTURING COMPANY
Appellee,
v.
G. D. BAIR, DIRECTOR OF REVENUE
STATE OF IOWA
Appellant.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed August 4, 1977)

Notice is hereby given that Moorman Manufacturing Company, the Appellee above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Iowa reversing the rulings of the Polk County District Court in favor of Appellee and affirming the District Court's rulings adverse to Appellee entered in this action on May 25, 1977 and from the denial of Appellee's Petition for Rehearing entered on June 27, 1977.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

/s/ Walter R. Brown
Walter R. Brown

/s/ John V. Donnelly
John V. Donnelly
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APPENDIX E-1

CONSTITUTION OF THE UNITED STATES

ARTICLE I.

• • •

Section 8. The Congress shall have Power . . .

• • •

To regulate Commerce . . . among the several States . . .;

AMENDMENT 14.

Section 1. • • •; nor shall any State deprive any person of . . . property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX E-2

CODE OF IOWA

422.33 Corporate tax imposed

A tax is hereby imposed upon each corporation organized under the laws of this state, and upon every foreign corporation doing business in this state, annually in an amount equivalent to four percent of the net income received by such corporation during the income year.

1. If the trade or business of the corporation is carried on entirely within the state, the tax shall be imposed on the entire net income, but if such trade or business is carried on partly within and partly without the state, the tax shall be imposed only on the portion of the net income reasonably attributable to the trade or business within the state, said net income attributable to the state to be determined as follows:

a. Interest, dividends, rents and royalties (less related expenses) received in connection with business in the state, shall be allocated to the state, and where received in connection with business outside the state, shall be allocated outside of the state.

b. Net income of the above class having been separately allocated and deducted as above provided, the remainder of the net income of the taxpayer shall be allocated and apportioned as follows:

* * *

Where income is derived from the manufacture or sale of tangible personal property, the part thereof attributable to business within the state shall be in that proportion which the gross sales made within the state bear to the total gross sales.

The gross sales of the corporation within the state shall be taken to be the gross sales from goods sold and delivered within the state, excluding deliveries for transportation out of the state.

For the purpose of this section, the word "sale" shall include exchange, and the word "manufacture" shall include the extraction and recovery of natural resources and all processes of fabricating and curing. The words "tangible personal property" shall be taken to mean corporeal personal property, such as machinery, tools, implements, goods, wares, and merchandise, and shall not be taken to mean money deposits in banks, shares of stock, bonds, notes, credits, or evidence of an interest in property and evidences of debt.

2. If any taxpayer believes that the method of allocation and apportionment hereinbefore prescribed, as administered by the commission and applied to his business, has operated or will so operate as to subject him to taxation on a greater portion of his net income than is reasonably attributable to business or sources within the state, he shall be entitled to file with the commission a statement of his objections and of such alternative method of allocation and apportionment as he believes to be proper under the circumstances with such detail and proof and within such time as the commission may reasonably prescribe; and if the commission shall conclude that the method of allocation and apportionment theretofore employed is in fact inapplicable and inequitable, it shall redetermine the taxable income by such other method of allocation and apportionment as seems best calculated to assign to the state for taxation the portion of the income reasonably attributable to business and sources within the state, not exceeding, however, the amount which would be arrived at by application of the statutory rules for apportionment.

(Note: The foregoing Section 422.33, Code of Iowa, is as it appears at Vol. II, p. 1669 of the 1966 edition of the Code; it has been amended subsequently in respects not material to this case and appears in its latest form in Code of Iowa (1977), Vol. II, p. 2078.)

422.35 Net income of corporation—how computed.

The term "net income" means the taxable income less the net operating loss deduction, both as properly computed for federal income tax purposes under the Internal Revenue Code of 1954, with the following adjustments:

1. Subtract interest and dividends from federal securities.

2. Add interest and dividends from foreign securities and from securities of state and other political subdivisions exempt from federal income tax under the Internal Revenue Code of 1954.

3. Where the net income includes capital gains or losses, or gains or losses from property other than capital assets, and such gains or losses have been determined by using a basis established prior to January 1, 1934, an adjustment may be made, under rules and regulations prescribed by the state tax commission, to reflect the difference resulting from the use of a basis of cost or January 1, 1934, fair market value, less depreciation allowed or allowable, whichever is higher. Provided that the basis shall be fair market value as of January 1, 1955, less depreciation allowed or allowable, in the case of property acquired prior to that date if use of a prior basis is declared to be invalid.

4. Subtract federal income taxes paid or accrued, as the case may be, during the tax year, adjusted by any

federal income tax refunds; and add the Iowa income tax deducted in computing said taxable income.

5. Add the amount by which the basis of qualified depreciable property is required to be increased for depreciation purposes under the Internal Revenue Code Amendments Act of 1964 to the extent that such amount equals the net amount of the special deduction allowed on the basis of the amount by which the depreciable basis of such qualified property was required to be reduced for depreciation purposes under the Internal Revenue Code Amendments Act of 1962. The "net amount of the special deduction" shall be computed by taking the sum of the amounts by which the basis of qualified property was required to be decreased for depreciation purposes for the years 1962 and 1963 and subtracting from it the sum of the amounts by which the basis of such property was required to be increased, prior to 1964, for depreciation or disposition purposes under the Internal Revenue Code Amendments Act of 1962.

Provided, however, that a corporation affected by the allocation provisions of section 422.33 shall be permitted to deduct only such portion of the deductions for net operating loss and federal income taxes as is fairly and equitably allocable to Iowa, under rules and regulations prescribed by the state tax commission.

(Note: The foregoing Section 422.35, Code of Iowa, is as it appears at Vol. II, p. 1670 of the 1966 edition of the Code; with respect to taxable years beginning on or after January 1, 1967, Subsection 4 was amended by inserting "fifty (50) per cent of the" preceding the words "federal income taxes", Acts of 1967 (62 G.A.) ch. 348, §17. The latest form of Section 422.35 appears in Code of Iowa (1977), Vol. II, p. 2080.)